

# Media Leagues: Australia Suggests New Professional Sports Leagues for the Twenty-First Century

James B. Perrine

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# MEDIA LEAGUES: AUSTRALIA SUGGESTS NEW PROFESSIONAL SPORTS LEAGUES FOR THE TWENTY-FIRST CENTURY

JAMES B. PERRINE\*

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INTRODUCTION

“For the Murdochs and the Disneys, sports is no game. It’s a hot, global entertainment product—and that’s changing all the rules.”<sup>1</sup>

In both the United States and Australia, sports programming is a major component of contemporary television content. Each year, media companies spend billions of dollars for the television rights to major sporting events.<sup>2</sup> Since Americans and Australians avidly watch professional sporting events, securing a stable supply of professional sports programming is now more than ever a top priority for many firms seeking to attract consumers.<sup>3</sup>

An examination of professional sports leagues and the media industry in the United States and Australia reveals an interesting market situation. An increasing number of mega-media companies are seeking to purchase the transmission rights of the established professional sports leagues in each country.<sup>4</sup> A mega-media company has no long-term assurance of obtaining professional sports programming since leagues auction their transmission rights to the highest bidder approximately every four to eight years. In addition, a mega-media company’s supply of sports programming may be suspended in the short run if an internal league matter, such as a labor dispute, cancels part of the playing season.

Recent experiences in Australia suggest that mega-media companies may create “media leagues” instead of purchasing the television rights of

1. N.Y. TIMES, Oct. 18, 1998 (front cover) (Magazine).

2. Richard Alm, *Flat Ratings Don’t Support Television Spend-a-Thon*, SEATTLE TIMES, Dec. 12, 1999, at C11 (noting that media companies have spent over \$29 billion for exclusive television rights to sporting events over the past two years), *available at* 1999 WL 6304258.

3. MICHAEL J. WOLF, THE ENTERTAINMENT ECONOMY 4 (1999) (“*Entertainment – not autos, not steel, not financial services – is fast becoming the driving wheel of the new world economy.*”) (emphasis in original).

4. The established professional sports leagues in the United States are the National Football League (NFL), National Basketball Association (NBA), Major League Baseball (MLB), and National Hockey League (NHL). In Australia, the most popular professional sports leagues are the National Rugby League (NRL), Australian Football League (AFL), and the Super 12 rugby union competition involving teams from Australia, New Zealand, and South Africa. Established, but less popular, professional sports leagues in Australia are the National Basketball League (NBL) and the National Soccer League (NSL).

established professional sports leagues. A media league is a mega-media company's in-house production of a professional sports league. For example in 1994, News Ltd., the Australian branch of Rupert Murdoch's News Corporation, desired the pay television rights to professional rugby league in order to boost subscriptions to its nascent cable television venture. News Ltd. could not obtain these rights from the established league because they had already been sold to another mega-media company that was involved in a competing cable television enterprise.<sup>5</sup> To obtain rugby league programming, News Ltd. decided to start and operate a new professional rugby league competition in which it owned several of the teams.<sup>6</sup>

This work is a study of the media league concept and its relation to the structure of professional sports leagues and the viability of rival professional sports leagues. Almost all professional sports leagues presently operating are organized along horizontal lines. Traditional professional sports leagues are, generally speaking, associations of independently owned and operated clubs.<sup>7</sup> For a traditional league to produce a product, the independent clubs must cooperate extensively with one another. A media league, on the other hand, is organized vertically. The sole producer of a media league is a mega-media company, which ultimately controls every aspect of the enterprise including the individual teams. In a media league, the need for cooperation between independent entities that may not have mutual economic objectives is substantially, if not entirely, eliminated.

In the last several decades, the vast majority of rival professional leagues have either succumbed to insolvency or merged weakly with the established league in the sport.<sup>8</sup> These historical experiences have led many commentators to conclude that the market is incapable of producing a rival professional sports league that can compete effectively against the established league in any given sport.<sup>9</sup> The hypothesis presented here is that with the

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5. MIKE COLMAN, *SUPER LEAGUE: THE INSIDE STORY* 34-38 (1996).

6. *Id.* at 62-63.

7. MICHAEL J. COZZILLO & MARK S. LEVINSTEIN, *SPORTS LAW* 20 (1997).

8. Walter C. Neale, *The Peculiar Economics of Professional Sports: A Contribution to the Theory of the Firm in Sporting Competition and in Market Competition*, 78 Q. J. ECON. 1, 7 (1964) (noting that merger of the established and rival leagues and bankruptcy of the rival league are the historically observed outcomes involving rival leagues). See generally TERRY PLUTO, *LOOSE BALLS: THE SHORT, WILD LIFE OF THE AMERICAN BASKETBALL ASSOCIATION* 432 (1990) (detailing the merger between the NBA and the rival American Basketball Association); DAVID S. NEFT & RICHARD M. COHEN, *THE FOOTBALL ENCYCLOPEDIA: THE COMPLETE HISTORY OF PROFESSIONAL NFL FOOTBALL FROM 1892 TO THE PRESENT* 412 (1991) [hereinafter *THE FOOTBALL ENCYCLOPEDIA*] (describing the circumstances leading to the merger between the NFL and the rival American Football League).

9. See, e.g., Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 718-22 (1989)

integration of the telecommunications and media industries this conclusion about the feasibility of market-generated rival leagues needs to be re-examined. Though not yet conclusive,<sup>10</sup> evidence from both the United States and Australia supports the proposition that the market can produce a viable challenger to an established professional sports league and that a media league could be such a firm.

The first chapter of the article examines the development and structure of professional sports leagues. This chapter also sets forth the similarities and differences between traditional leagues in the United States and Australia. Chapter two reviews problems currently plaguing traditional leagues due, at least in substantial part, to their structural design. With this background, the media league concept is discussed in chapter three. The structural organization of a media league is contrasted with that of a traditional league; factors favoring media league formation are highlighted; the ability of a media league to address the problems associated with traditional leagues is examined; and the challenges to media league formation in the United States and Australia are analyzed. Chapter four considers whether a media league can be a viable rival to an established professional sports league. This chapter compares the most recent major rival professional sports league experience in the United States, which did not involve a media league, with the most recent such experience in Australia, in which a mega-media company played a prominent role. The work concludes with an analysis of the prospects for media league creation in both the United States and Australia.

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(discounting the probability of the creation of a rival professional sports league other than through the forced divestiture of the American established professional sports leagues, particularly the NFL and MLB); Matthew J. Mitten & Bruce W. Burton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 MD. L. REV. 57, 95-96 (1997) ("The formation of a rival league does not present a viable threat to an established league . . .").

10. As of this writing, no major sport in the United States or Australia has more than one professional sports league. In the United States, the NBA, NFL, MLB, and NHL are the major professional sports leagues. In Australia, the major professional sports leagues are the NRL, AFL, NBL, and NSL. The other two major Australian sports played professionally are cricket and rugby union. Competitions in these two sports consist of contests between teams from different Australian states (e.g., the Pura Milk Cup domestic cricket competition) or between Australian teams and teams from other countries (e.g., international Test cricket matches), rather than a series of games involving clubs from different Australian cities. The factors favoring the creation of media leagues transcend all sports. Consequently, this work is not sport specific.

## CHAPTER ONE

## DEVELOPMENT AND STRUCTURE OF TRADITIONAL PROFESSIONAL SPORTS LEAGUES: THE NEED FOR COLLECTIVE ACTION AMONG INDEPENDENT CLUBS

## I. TRADITIONAL PROFESSIONAL SPORTS LEAGUES IN THE UNITED STATES

*A. Barnstorming Teams*

The precursors of traditional professional sports leagues in the United States were the "barnstorming teams" of the late nineteenth and early twentieth centuries.<sup>11</sup> A barnstorming team was basically a road show. A promoter hired a team of players that went from town to town playing local squads.<sup>12</sup> A barnstorming team's source of revenue was generally its share of the gate receipts for each game,<sup>13</sup> though a few teams could command a guaranteed fee for their appearance.<sup>14</sup> In addition to playing local teams, the best of the barnstorming teams usually scheduled games against one another in larger venues.<sup>15</sup> Though initially successful, barnstorming tours proved to be too unstable to generate a long-term revenue stream for all but the most entertaining of teams.<sup>16</sup>

*B. Traditional Professional Sports Leagues*

In the United States, traditional professional sports leagues developed after barnstorming teams proved insufficiently popular with consumers to be profitable.<sup>17</sup> The owners of the early professional teams realized that a more

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11. See, e.g., THE OFFICIAL NBA BASKETBALL ENCYCLOPEDIA 15-26 (Zander Hollander & Alex Sachare eds., 1989) [hereinafter NBA ENCYCLOPEDIA] (discussing the American barnstorming basketball teams of the early 1900s).

12. *Id.* at 18 (noting that Jim Furey, "a New York promoter," helped organize the Original Celtics, one of the greatest barnstorming basketball teams in the United States after World War I).

13. *Id.* at 27 (noting that the New York Renaissance Five "usually was paid a percentage of the gate").

14. *Id.* at 26 (stating that the Original Celtics, prior to the Depression, "would never book an appearance for a guarantee of less than \$400 . . .").

15. *Id.* (reporting that "as many as 15,000 customers" would turn up to watch the Original Celtics play the Renaissance Five).

16. *Id.* at 39 (noting that the instability of early barnstorming teams and professional basketball leagues hindered their ability to attract a popular following).

17. John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition*

stable competition structure was needed to attract spectators and sustain revenues.<sup>18</sup> The solution that the team owners devised was to form leagues in which teams would systematically play one another.<sup>19</sup>

Though the early years of American professional sports saw the creation of several professional sports leagues, over time one league in each sport was able to gain the public's allegiance and dominate its rivals. Baseball was the first American sport in which leagues developed. The National and American Leagues, the two major professional baseball leagues in operation today, were created in 1871<sup>20</sup> and 1901,<sup>21</sup> respectively. The two leagues were rivals until 1903, when the owners of the clubs in each league entered into an agreement to work cooperatively.<sup>22</sup> In recent years, the two leagues have substantially integrated their operations to the point where a single "Major League Baseball" (MLB) office oversees and directs the clubs in each league.

The National Football League (NFL), the dominant professional football league in the United States, originated from a meeting of team owners in Canton, Ohio in 1920.<sup>23</sup> The NFL has withstood challenges from several rival leagues since its inception. The most significant competitor was the American Football League. In 1966, all of the AFL teams joined the NFL pursuant to a merger agreement between the two leagues.<sup>24</sup>

A dominant league did not develop in professional basketball until 1949 when two rival basketball leagues, the National Basketball League and the Basketball Association of America merged to form the National Basketball Association (NBA).<sup>25</sup> The NBA faced a serious challenger to its supremacy in 1967 when the American Basketball Association (ABA) was formed.<sup>26</sup> Nine years after the ABA's inception, four of its teams joined the NBA pursuant to a merger agreement between the two leagues.<sup>27</sup>

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*and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013, 1064 n.171 (commenting that professional sports leagues developed out of economic necessity because of the unprofitability of barnstorming teams); 1 ROBERT C. BERRY & GLENN M. WONG, *LAW AND BUSINESS OF THE SPORTS INDUSTRIES* 1 (1986) (noting that touring basketball teams were not very successful and that professional basketball did not become firmly established in the United States until the creation of a stable professional league).

18. NBA ENCYCLOPEDIA, *supra* note 11, at 39-55 (describing the development of the NBA).

19. *Id.*

20. TOTAL BASEBALL 10 (John Thorn & Pete Palmer eds., 1989).

21. *Id.* at 15.

22. *Id.*

23. THE FOOTBALL ENCYCLOPEDIA, *supra* note 8, at 20.

24. *Id.* at 404, 412.

25. NBA ENCYCLOPEDIA, *supra* note 11, at 49.

26. PLUTO, *supra* note 8, at 23.

27. *Id.* at 427-28.

Traditional professional sports leagues in the United States basically have the same organizational framework.<sup>28</sup> Individual teams enter into a contractual agreement establishing the relationships between the clubs and between the clubs and the league.<sup>29</sup> This agreement is usually embodied in a "League Constitution and By Laws."<sup>30</sup> The League Constitution gives ultimate authority over league management decisions and policies to "an executive committee or board of governors, a body composed of one voting representative from each member club."<sup>31</sup> In addition, the Constitution provides for the creation of a "league office," directed by a president or commissioner. The league office is responsible for the league's day-to-day operational decisions and performs central tasks such as scheduling games and disciplining clubs and players for violation of league rules.<sup>32</sup>

The clubs in a traditional professional sports league are legal entities separate from the league itself.<sup>33</sup> Most clubs are for-profit entities.<sup>34</sup> A club may be a sole proprietorship, a partnership, or a corporation, though the League Constitution may prohibit in word or affect certain forms of club ownership.<sup>35</sup> Clubs control most of their daily operations and affairs such as making "decisions concerning ticket prices, player acquisitions and salaries, the hiring of coaches and administrators, the terms of [their] stadium lease[s], and the local radio broadcasting of [their] games."<sup>36</sup>

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28. Roger G. Noll, *Alternatives in Sports Policy*, in GOVERNMENT AND THE SPORTS BUSINESS 411, 420 (Roger G. Noll ed., 1974) ("All sports have essentially the same governing structure . . . . [A] single commissioner who together with a committee of owners, decides upon the operating rules of the sport."); COZZILLO & LEVINSTEIN, *supra* note 7, at 20 (discussing the characteristics of a traditional professional sports league in the United States).

29. Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751, 757 (1989) ("The basic relationship between clubs within a league is defined by contract.").

30. Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 259 n.143 (1984) (discussing provisions of the NFL's and NHL's Constitutions and By Laws).

31. Gary R. Roberts, *The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View*, 60 TUL. L. REV. 562, 573 n.29 (1986).

32. *Id.* ("Day to day operational decisions are made by the league office's administrative personnel, headed by the president or commissioner.").

33. Goldman, *supra* note 29, at 757 ("The clubs are separate legal entities . . .").

34. David M. Van Glish, *The Future of Sports Broadcasting and Pay-Per-View: An Antitrust Analysis*, 1 SPORTS LAW J. 79, 90 (1994) ("According to NFL bylaws, the National Football League is an unincorporated association of independent, for profit football clubs.").

35. Lynn Reynolds Hartel, Comment, *Community-Based Ownership of a National Football League Franchise: The Answer to Relocation and Taxpayer Financing of NFL Teams*, 18 LOY. L.A. ENT. L.J. 589, 604 (1998) (noting that the Rules in the NFL Bylaws relating to new members are "so burdensome that it is a practical impossibility for a public corporation to own a franchise").

36. Goldman, *supra* note 29, at 757.

## II. TRADITIONAL PROFESSIONAL SPORTS LEAGUES IN AUSTRALIA

Professional sports leagues developed somewhat differently in Australia than they did in the United States. Unlike in the United States, the founders of professional sports leagues in Australia were not individual entrepreneurs.<sup>37</sup> Rather, the organizers were representatives from community social clubs that sponsored sports teams.<sup>38</sup> Consequently, professional sports leagues were not created for pecuniary reasons in Australia like they were in the United States.<sup>39</sup> The process by which Australian leagues were created, however, was very similar to how American leagues were formed. Representatives from each of the social clubs attended a meeting at which they decided to cooperate with one another to develop a league competition.<sup>40</sup>

Though analogous in some respects, there are differences between the structure of the major Australian and American traditional leagues. While a typical American league is a non-profit unincorporated association of individual for-profit clubs, an Australian league is generally a non-profit corporation whose "members" (*i.e.*, shareholders) include representatives from incorporated non-profit clubs.<sup>41</sup> In Australia, the members elect the Board of Directors that governs the league.<sup>42</sup> The number of directors is substantially less than the number of clubs in the league.<sup>43</sup> In the United States, each club

37. The development of professional sports leagues in Australia from local club competitions relates primarily to the Australian Football League (AFL) and Australian Rugby Football League Ltd. (ARL), a forerunner to the National Rugby League. A thorough discussion of each established professional sports league in Australia is beyond the scope of this paper. The material in the text is presented to provide background for later discussions in the work.

38. *News Ltd. v. Australian Rugby Football League Ltd.*, (1996) 58 F.C.R. 447, 1996 WL 33110742, at \*20 (Austl. Fed. Ct. March 11, 1996) (noting that the clubs in the New South Wales Rugby Football League, the first professional rugby league competition in Australia, were non-profit institutions).

39. Thomas Keneally, *Innocence*, in *LEAGUE OF A NATION* 71, 71 (David Headon & Lex Marinos eds., 1996) (noting that "questions of social justice for players rather than the desire for proliferation of codes or for commercial reward, were the . . . trigger" for the formation of the New South Wales Rugby Football League).

40. *News Ltd. v. Australian Rugby Football Ltd.*, [1996] 870 F.C.A. 1, at \*18 (Austl. Fed. Ct. Oct. 4, 1996) (AustLII.edu.au, Austl. Case Law) ("The beginnings of rugby league in Australia can be traced to a meeting attended by about 50 people at Bateman's Hotel, George Street, Sydney, on 8 August 1907").

41. *Id.* at \*21 (noting that members of the NSW Rugby League Ltd. who were to constitute the general committee included "two representatives from each club").

42. *Id.* at \*25 (referring to the NSW Rugby League Ltd.'s articles of incorporation that provide for members to elect four of the nine directors on the board); Daryl Timms, *John Gets the Nod*, NEWS.COM.AU (Nov. 16, 1999) (reporting that the AFL club presidents had elected a new commissioner to the AFL Commission at the league's directors meeting), available at <http://sport.news.com.au/news/4303869.htm>.

43. AUSTRALIAN FOOTBALL LEAGUE, AUSTRALIAN FOOTBALL LEAGUE 102<sup>ND</sup> ANNUAL REPORT



owner is represented on the league's "executive committee" so that the governing body of an American league is much larger than one in an Australian league.

As for individual clubs, in Australia a board of directors, not a single wealthy individual, has ultimate decision-making authority over a team's affairs.<sup>44</sup> Members/shareholders have the right to vote on issues that profoundly affect the club, such as whether to merge with another club in the league, relocate the team to a new location, or change the team's logo or colors.<sup>45</sup> Members do not have any voting rights with respect to player or coaching personnel or other like matters regarding the team. Members do not receive any financial return on their investment in the club since the corporation does not pay dividends; club memberships are not publicly traded; and upon winding up of the club, no surplus is distributed to shareholders.<sup>46</sup> Individuals purchase memberships in a club to support financially their favorite team and to receive benefits such as the right to buy season tickets, access to a special social area at the playing facility, and the opportunity to meet the players after the game.<sup>47</sup>

A unique aspect of traditional Australian professional sports leagues relative to American leagues is the relationship between a "sports club," which enters a team in the sporting competition, and a "leagues club," which is an incorporated social club.<sup>48</sup> A leagues club offers its members amenities such as bar, restaurant, entertainment offerings, and, in some Australian States, poker machines (*i.e.*, slot machines).<sup>49</sup> The sports club and the leagues club

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1998 14-15 [hereinafter AFL ANNUAL REPORT] (highlighting the eight AFL commissioners who govern the AFL's sixteen team competition) (on file with author).

44. *News Ltd.*, [1996] 870 F.C.A. at \*28-\*30 (AustLII.edu.au, Austl. Case Law) (detailing provisions of a NSW Rugby League club's articles of incorporation).

45. Steve Mascord, *Tigers and Magpies Vote to Pack Down Together*, SMH.COM.AU (July 28, 1999) (reporting that the members of the Balmain Tigers and Western Suburbs clubs voted to form a joint venture that would enter a team in the NRL), available at <http://www.smh.com.au/sports/league/news/199907/28/28league1.html>.

46. *News Ltd.*, [1996] 870 F.C.A. at \*29 (AustLII.edu.au, Austl. Case Law) (noting that the income or property of a NSW Rugby League club "must be applied solely towards the objects of the company and no portion thereof is to be paid by way of dividend, bonus or profit to members").

47. Interview with Roy Masters, Chief Editor for Rugby League, The Sydney Morning Herald in Sydney, Australia (June 15, 1999) [hereinafter Masters Interview].

48. Though not a part of every Australian established professional sports league, this "leagues club"—"sports club" relationship is prevalent in the NRL and AFL, the two most popular professional sports leagues in that country. In the Australian vernacular, one would speak of a "footy club" (*i.e.*, a team in the league) and its "leagues club." A detailed examination of the relationship between each sports club and leagues club in Australia is beyond the scope of this paper.

49. Since they are legal in New South Wales and Queensland, pokies, as they are commonly called in Australia, are found in the leagues clubs of the NRL, the most popular league in these two

are separate legal entities with each having a distinct board of directors.<sup>50</sup> A leagues club typically subsidizes its sports clubs operations such as providing funds for signing players or renovating playing facilities.<sup>51</sup>

Another distinction between American and Australian professional sports leagues is the geographic scope of a league's operations. The most popular American leagues operate in all geographic areas of the country and have a national following of fans. In Australia, the two most successful professional sports leagues, the National Rugby League (NRL) and Australian Football League (AFL), have limited geographic popularity.<sup>52</sup> The NRL—the rugby league competition—is followed principally in New South Wales, the Australian Capital Territory, and Queensland; while the AFL—the Australian rules football competition—is popular in Victoria, South Australia, Tasmania, and Western Australia. These leagues have limited appeal because the sports of rugby league and Australian rules football developed in Sydney and Melbourne, respectively, and the NRL and AFL have grown out of local club competitions played in those two cities. For an Australian league to have teams from more than one state, or for that matter one city, was unheard of twenty years ago.<sup>53</sup> Both the NRL and AFL are actively trying to expand nationally.<sup>54</sup>

### III. COOPERATION AMONG INDEPENDENT CLUBS IS THE CORNERSTONE OF TRADITIONAL PROFESSIONAL SPORTS LEAGUES IN THE UNITED STATES AND AUSTRALIA

Traditional professional sports leagues in the United States and Australia are built upon cooperation among individual clubs.<sup>55</sup> Clubs must agree on a

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states.

50. Masters Interview, *supra* note 47.

51. KEN ARTHURSON, ARKO: MY GAME 44 (1997) (noting that "Leagues clubs . . . have underwritten football for years"); *News Ltd.*, [1996] 870 F.C.A. at \*36-\*39 (AustLII.edu.au, Austl. Case Law) (noting the grants six leagues clubs made to their respective NSWRL clubs in 1991-94).

52. Warren Lee & Brendan Moylan, *Hosepipes and Footballs: How Sports Coverage went down the Gurgler*, 2 MEDIA AND ARTS REVIEW 93, 99 (1997) ("The ratings analysis performed by the ABA showed that viewing figures were strongly affected by regional interest in the sport being broadcast. Based on its analysis the ABA concluded that 'it is difficult to talk about sports that are of national significance or cultural significance to a majority of Australians.'" (quoting AUSTRALIAN BROADCASTING AUTHORITY, REPORT TO THE MINISTER FOR COMMUNICATION & THE ARTS: PAY TELEVISION SIPHONING INVESTIGATION, Attachment C, at 2 (May 13, 1994)).

53. *News Ltd.*, [1996] 870 F.C.A. at \*18 (AustLII.edu.au, Austl. Case Law) ("In 1982, Canberra and Illawarra became the first non-Sydney clubs to join the competition.").

54. AFL ANNUAL REPORT, *supra* note 43, at 18 ("Progressing the AFL game as a national code or sport is one of the AFL Commission's key strategic objectives . . .").

55. Daniel S. Mason & Trevor Slack, *Appropriate Opportunism or Bad Business Practice?*

vast range of issues, from the seemingly simple, such as scheduling games, to the very complex, such as revenue sharing. According to many commentators, this feature of a traditional professional sports league distinguishes its structure from all other forms of business organization.<sup>56</sup>

The need for collective action among clubs is not as great in a traditional Australian league as it is in a traditional American league. The independent clubs in an Australian league have delegated substantial decision-making authority to the league's "central competition organizer." In the United States, each club has retained its right to vote on significant league issues through its representative on the league's executive committee. Though clubs in American leagues have delegated some responsibilities to the "league office," the power of a "league office" of an American league is not as great as the power of the central competition organizer of an Australian league. For example, in Australia, a central competition organizer usually has the power to decide unilaterally based on objective criteria whether to increase or reduce the number of clubs in the league.<sup>57</sup> In the United States, to admit another team into a league generally requires the affirmative vote of a super-majority of the club owners.<sup>58</sup>

Having a central competition organizer, however, does not eliminate the requirement of collective action among the independent clubs and between the clubs and the competition organizer in a traditional Australian league. Clubs must agree to abide by the competition organizer's decisions. Though adherence to the final authority of the Board or Commission is a condition upon entering the league,<sup>59</sup> it is not uncommon for a club to challenge, either informally or legally, a decision of the competition organizer that negatively

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*Stakeholder Theory, Ethics, and the Franchise Relocation Issue*, 7 MARQ. SPORTS L.J. 399, 413 (1997) ("Without the cooperation of the other league members, teams could not produce the league product, and do not have any function outside of their arrangement with the league.").

56. Roberts, *supra* note 30, at 238-60 (demonstrating that traditional sports leagues are different from any other type of business organization); BERRY & WONG, *supra* note 17, at 3 (noting that it is difficult to pigeonhole a professional sports league into a particular business organization form).

57. *Wayde v. New South Wales Rugby Football League Ltd.*, (1985) 180 C.L.R. 459, 1985 WL 514185, at \*7-\*8 (Mason, A.C.J., Wilson, Deane, & Dawson, JJ.) (Austl. Oct. 17, 1985) (concluding that the NSWRL's articles of incorporation gave the league's Board of Directors the authority to eliminate the Western Suburbs club from the league if it honestly believed that decision was in the best interests of the game).

58. Christian M. McBurney, Note, *The Legality of Sports Leagues' Restrictive Admissions Practices*, 60 N.Y.U. L. REV. 925, 926 (1985) (noting that American professional sports leagues typically require three-fourths of the club owners to vote in favor of admitting a new team to the league).

59. *News Ltd.*, [1996] 870 F.C.A. at \*28 (AustLII.edu.au, Austl. Case Law) (noting that the form for application into the NSWRL required the applying club to agree to "abide by . . . decisions of the Board of Directors of the League").

affects it.<sup>60</sup> The ultimate recourse the clubs have against the central competition organizer is exercise of their political power through the election of the directors or commissioners who operate the league.

The AFL's recent expansion efforts evidence the necessity for clubs in an Australian league to cooperate with one another for the league to be successful. The AFL is trying to establish a second team in New South Wales by moving a club, the North Melbourne Kangaroos, from Melbourne, home of ten clubs, to Sydney. To accomplish this objective, the AFL Commission underwrites the Kangaroos' games in Sydney while the club attempts to make the transition.<sup>61</sup> Though the other clubs are suspicious of any favorable treatment a particular club may receive from the Commission, all sixteen clubs in the league understand that they must cooperate with one another for the development of the game nationally, which promises to increase the revenues of all the clubs. Thus, the clubs have asked the Commission to determine how many teams the Melbourne market can sustain and, if necessary, to formulate plans in conjunction with the clubs to relocate teams to other Australian States.<sup>62</sup>

#### IV. PRODUCTS OF A TRADITIONAL PROFESSIONAL SPORTS LEAGUE

The "products," or commodities, of a professional sports league are: (1) live sporting contests between two teams in the league;<sup>63</sup> (2) rights to transmit images or descriptions of the league's sporting contests (e.g., television and radio broadcasting rights);<sup>64</sup> and (3) merchandising and sponsorship rights.<sup>65</sup>

60. Jake Niall, *AFL Fails to Convince Clubs on Lions' Share*, THEAGE.COM.AU (Nov. 12, 1999) (discussing AFL Commission's attempt to pacify clubs protesting the Commission's decision to grant the Brisbane Lions a \$400,000.00 salary cap bonus), available at <http://203.89.231.106/age023.asp?mediaID=10847.html>; See generally *Wayde*, 1985 WL 514185 (deciding Western Suburbs' legal challenge to the NSWRL's Board of Directors' decision to kick the club out of the league).

61. The Kangaroos played five of its twenty-two games in Sydney in 1999, and plan to play five games there in 2000 and six games there from 2001-03. The AFL has agreed to underwrite these games to a maximum of \$500,000.00 in 1999 and 2000 and \$600,000.00 for the 2001-03 period. AFL ANNUAL REPORT, *supra* note 43, at 19.

62. *Power Switch Within League*, THEAGE.COM.AU (noting that all 16 clubs in the league "have spoken with one voice" to the AFL Commission about the long term prospects of maintaining 10 clubs in Victoria), available at <http://203.89.231.106/age.023.asp?mediaID=5417.html> (last visited June 21, 1999).

63. Neale, *supra* note 8, at 3.

64. *Id.* This category includes all platforms from which a mega-media company may transmit images or descriptions of a league's games such as free-to-air television, cable television, satellite television, pay-per-view television, radio, or the Internet.

65. Simon Davidson, *The Single Economic Entity Theory and Sports Leagues in Australia*, 2 COMPETITION & CONSUMER L.J. 171, 197 n.117 (1994) (noting AFL revenues from the sale of

A professional sports league also produces the pennant race or "league standing effect," a stream of utility to consumers who enjoy following their favorite teams' efforts to win the league championship.<sup>66</sup>

Of these products, the sale of media transmission rights is the greatest revenue-producer for a league.<sup>67</sup> For this reason, "[t]elelevision [is] the salvation of modern professional sports."<sup>68</sup> In its transaction with a mega-media company, however, a traditional league exchanges more than its transmission rights. It also parts with some of its autonomy in operating the league. That is, a mega-media company will want some control over a league's affairs in order to protect its investment in the league's transmission rights. The amount of control a league relinquishes to a mega-media company depends on the relative bargaining strength of the parties during negotiations for the sale of the league's transmission rights.<sup>69</sup>

A mega-media company's influence over a league can manifest itself in a variety of ways. A mega-media company may dictate the starting times for a league's matches. Or, a league may change its playing rules to make its

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sponsorship and merchandising rights). See also Stephen Corones, *Super League: A Victory for Competition and Free Markets*, 25 AUSTL. BUS. L. REV. 150, 154 (1997) (noting that the products of an Australian professional sports league were the matches sold to spectators, transmission rights sold to free-to-air and pay TV operators, and sponsorship rights sold to corporations); Mason & Slack, *supra* note 55, at 413. Mason and Slack contend that:

The product itself is a series of sporting contests that each league produces and sells to distinct groups: 1) fans who pay to attend games, and consume facility-related products such as concessions and parking; 2) television and cable networks who bid for the right to televise league games; 3) corporations who seek increased revenues through either the synergy of owning sports teams as part of a larger entertainment empire, or through affiliating their own products with that of teams or a league; 4) purchasers of league-licensed apparel; and 5) cities, represented by sports authorities, who bid for the right to host league games in their communities and venues. Thus, although producing a single league product—a series of games with an uncertain outcome—leagues sell this product in a variety of ways to a variety of different consumers.

*Id.* (footnotes omitted).

66. Neale, *supra* note 8, at 3 (discussing the league standing effect). Only a league, not an individual club, can produce the league standing effect. HENRY G. DEMMERT, *THE ECONOMICS OF PROFESSIONAL TEAM SPORTS* 1, 14 (1973) (noting that the pennant race "is primarily external to the production process of any individual club . . .").

67. Kevin E. Martens, *Fair or Foul? The Survival of Small-Market Teams in Major League Baseball*, 4 MARQ. SPORTS L.J. 323, 355 (1994) ("Broadcasting revenues currently account for approximately 50% of the total revenues in Major League Baseball.").

68. BERRY & WONG, *supra* note 17, at 61.

69. Peter Brewington, *MLS Abandons Shootout, Shortens Season*, USATODAY.COM (noting that Major League Soccer (MLS), the top American professional soccer league, was able to negotiate its preferred time for the transmission of its games with the Walt Disney Co. in its most recent television contract), available at [www.usatoday.com/sports/soccer/mls/fs/mlsfs30.htm](http://www.usatoday.com/sports/soccer/mls/fs/mlsfs30.htm) (last visited Nov. 18, 1999).

contests more attractive to television viewers.<sup>70</sup> Conflicts between a traditional league and the mega-media company that purchases the league's transmission rights over control of the league are not uncommon. For example, in 1999 MLB and The Walt Disney Co. ("Disney") were embroiled in a heated controversy over Disney's shifting of telecasts of MLB games from its primary sports programming cable channel, ESPN, to its secondary sports cable channel, ESPN2. Disney made this decision because it wanted to air NFL rather than MLB games since telecasts of NFL contests attract more viewers than MLB contests.<sup>71</sup> On the eve of the commencement of litigation between the parties, MLB and Disney entered into a new agreement where MLB consented to Disney's shifting of games to ESPN2 in exchange for increased coverage of MLB games on Disney's media outlets, including ESPN and ESPN2.<sup>72</sup>

Though its most lucrative commodity is its transmission rights, the underlying determinant of a traditional league's success is the magnitude of its league standing effect. The interest consumers have in a league is directly proportional to the uncertainty in the outcome of the on-the-field competition among the individual clubs.<sup>73</sup> Since the sale of any of its products (e.g., spectator tickets, licensed merchandise, or transmission rights) is dependent on consumer interest, a traditional league can thrive only if there is competitive balance among the clubs in the league.<sup>74</sup>

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70. ARTHURSON, *supra* note 51, at 29 (commenting that the elimination of traditional scrums in rugby league was done in order to make the game faster, open, and more entertaining for fans); *id.* at 168 (noting the need for the ARL to eliminate rough play in the league since in a "time of vast colour TV coverage, rugby league could no longer carry a 'thug' tag if it was to thrive"); JIM MCKAY ET AL., *Americanisation, Globalisation and Rugby League*, in LEAGUE OF A NATION, *supra* note 39, at 215, 221 (noting that the commercialization of rugby league has caused the sport to shed its working class image in order to appeal to middle class spectators and television viewers); Greg Boeck, *Rules Changes Aimed at Improving Play*, USATODAY.COM (Nov. 1, 1999) (discussing the NBA's rule changes for the 1999-2000 season designed to make its games more enjoyable to watch), available at <http://www.usatoday.com/sports/basketba/99pre/full07.htm>.

71. Rudy Martzke, *Venturi Valued on CBS Golf Team*, USATODAY.COM (Apr. 9, 1999) (noting that "[i]n 1997, TNT's Sunday [night] NFL game ratings topped ESPN's baseball 9.1 to 1.7"), available at <http://www.usatoday.com/sports/comment/colmart.htm>.

72. *ESPN Boosts Annual MLB Coverage*, ESPN.COM (reporting on the new agreement between MLB and Disney), available at <http://espn.go.com/mlb/news/1999/1206/216862.html> (last visited Dec. 7, 1999).

73. Neale, *supra* note 8, at 2-3; Weistart, *supra* note 17, at 1018 n.17 ("A point that has never been substantially disputed, even by critics of league practices, is that the success of a league requires that clubs field teams that are relatively evenly matched in terms of their playing ability.").

74. DEMMERT, *supra* note 66, at 31 ("The existence of a severe and prolonged imbalance among teams could conceivably threaten the stability of the league by destroying an essential aspect of the product (uncertainty of outcome), and by creating sporting and financial losers among member clubs."); John P. Morris, *In the Wake of the Flood*, 38 LAW & CONTEMP. PROBS. 85, 88 (1973) ("The

Though differences exist between them, professional sports leagues in the United States and Australia share a basic organizational structure and generate similar products. Traditional leagues in each country depend on cooperation among the individual clubs to maintain the value of their transmission rights. When this cooperation is absent, the league is likely to face problems that reduce competitive parity among the teams and lower the value of its products. The next chapter examines a number of the problems currently affecting American and Australian leagues owing to their structural organization.

## CHAPTER TWO

### PROBLEMS AFFECTING TRADITIONAL AMERICAN AND AUSTRALIAN LEAGUES ATTRIBUTABLE TO THEIR STRUCTURAL ORGANIZATION

Problems in American and Australian traditional leagues arise when league members cannot agree on a particular course of league action.<sup>75</sup> A typical situation is one where a minority of clubs in the league (often a single club) wants to take an action that is in its—but not the league's—best economic interests.<sup>76</sup> An examination of some of the most pressing problems

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success of a franchise and, in the long run, the success of a league depend upon continued fan support, which will be forthcoming only if the basic concept of equalization of playing strengths is preserved.”). *But see generally* TERRY M. ALCHIN & HENRY W. TRANBY, DOES THE LOUIS-SCHMELLING PARADOX EXIST IN RUGBY LEAGUE MATCH ATTENDANCES IN AUSTRALIA 14 (Working Paper in Economics No. WP95/09, 1995) (concluding that price, income, and market size, but not uncertainty of outcome, significantly affected attendances at rugby league matches in Australia) (on file with author). Researchers have yet to determine the optimal level of competitive balance for a professional sports league. Dennis Zimmerman & William A. Cox, *The Baseball Strike and Federal Policy: An Economic Analysis*, H.R. DOC. NO. 95-152 E, at 2 n.4 (1995). Zimmerman and Cox find that:

The optimal level of competitive balance (presumably the level that maximizes factor incomes) is not known. It is certainly not represented by equal team winning percentages. In fact, some evidence suggests that large-market teams should have higher winning percentages over time than small market teams, but not so high to remove uncertainty and drama from the pennant races.

*Id.*

75. Goldman, *supra* note 29, at 776 (noting that co-ventures can have “mixed motives, and their decisions can have dual effects”).

76. *Id.* at 780 (“As a result of their separate ownership and profits and losses, individual league members’ economic interests sometimes conflict with the league’s interest.”); COZZILLIO & LEVINSTEIN, *supra* note 7, at 30 (“[O]wners of the teams in a traditional model league simply do not have anything approaching the complete unity of interest prompting them to act together with only the best interests of the league at heart.”). *See generally* Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1, 9 (“To the extent joint ventures are composed of individual profit-maximizing entities, the incentives of members may deviate substantially from the best interests of the venture as a whole, with ‘best interests’ defined as the outcome that maximizes venture-wide profits.”).

in American and Australian leagues shows the causal relationship between the lack of cooperation and conflict in a traditional league.

#### I. PROBLEMS RELATED TO ACHIEVING COMPETITIVE BALANCE IN A TRADITIONAL LEAGUE

To achieve competitive balance, playing talent must be distributed relatively evenly throughout the league.<sup>77</sup> Since disparity between “rich clubs” and “poor clubs” with respect to talent level is the primary cause of competitive imbalance, parity in a league can be achieved only by reducing the inequality of financial resources among clubs.<sup>78</sup> A system of revenue sharing among the individual clubs and a cap on players’ salaries are the most recent means American and Australian leagues have used to try to achieve competitive balance.<sup>79</sup>

##### A. *Lack of Competitive Balance in Major League Baseball*

The first step in creating a revenue sharing arrangement in a traditional professional sports league is for the individual clubs to agree that such an arrangement is necessary for the success of the league as a whole and for each club. As the current situation in MLB demonstrates, clearing that hurdle is not always easy.<sup>80</sup>

Individual clubs have not taken affirmative steps to achieve a proper level of competitive balance in MLB. Though they share equally the revenues from the sale of league-wide transmission and sponsorship rights and licensed merchandise, individual clubs in MLB do not share any “club-generated” revenues. In particular, an individual club retains almost all of the revenues

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77. Morris, *supra* note 74, at 87 (“Equalization of the competitive playing strengths of the teams comprising a professional sports league is achieved by controlling the distribution of player talent within the league.”).

78. Zimmerman & Cox, *supra* note 74, at Summ. (“Should a market failure exist in baseball, . . . it is due to inequality of financial resources among teams. Any policy that reduces that inequality will improve competitive balance and reduce the market failure.”).

79. Noll, *supra* note 28, at 417 (commenting that revenue sharing and a salary cap provide balanced competition, greater financial security for weaker teams, and more equitable player salaries).

80. The remarks of George Steinbrenner, leader of the New York Yankees, a “rich” MLB club, aptly reflect the difficulty in persuading “rich” clubs to share with “poor” clubs: “There’s disparity in the world and in this country. There’s disparity between General Motors and some little company. You can’t say, ‘Well, let’s all share everything equal,’ or else we should be over in Russia. And it didn’t work over there.” Hal Bodley & Erik Brady, *Baseball’s New Caste System*, USA TODAY, Apr. 2, 1999, at 1C. See also Sean McAdam, *Looking for Answers*, ESPN.COM (Feb. 6, 1999) (noting the disagreement between “poor” and “rich” club owners over whether a competitive imbalance problem exists in MLB), available at <http://espn.go.com/mlb/state/solutions.html>.



from both its sale of the rights to televise its regular season games in its local area and from its playing facilities.<sup>81</sup> Consequently, the revenues of clubs that are in large media markets or that play in state-of-the-art playing facilities<sup>82</sup> are substantially greater than the revenues of clubs playing in smaller media markets or facilities lacking revenue-enhancing attractions.<sup>83</sup> Since MLB does not have any restrictions on the amount a team can spend on player salaries, the “rich” teams outbid the “poor” teams for the best playing talent.<sup>84</sup> The sharp increase in player salaries over the past several years has exacerbated the on-field effects of the revenue disparity between individual clubs in MLB.<sup>85</sup>

Though a club’s spending large sums to acquire players does not guarantee it a winning season, recent MLB seasons have demonstrated that not having a large player payroll is a guarantee of not winning.<sup>86</sup> Prior to the start of each season, the clubs with little or no chance of winning the World Series—the championship in MLB—are easily identified by their payroll figures.<sup>87</sup> Similarly, the club winning the World Series in each of the past seven seasons has been in the top five with respect to player payments for that particular season.<sup>88</sup>

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81. Jeffery A. Rosenthal, *The Football Answer to the Baseball Problem: Can Revenue Sharing Work?*, 5 SETON HALL J. SPORT L. 419, 424 & n.15 (1995) (noting that MLB clubs share gate receipts approximately 85%-15% between the home and visiting teams and that a small percentage of the revenues from the sale of local cable transmission and superstation rights is shared among the clubs).

82. MARTIN J. GREENBERG & JAMES T. GRAY, *THE STADIUM GAME* 18-20 (1996) (describing the features of a state-of-the-art playing facility, all of the attributes of which should “either directly or indirectly return revenue to the owner” (quoting Ron Turner, noted sports architect)).

83. Bodley & Brady, *supra* note 80 (noting that MLB clubs that receive large media revenues or have “cash-machine ballparks” earn significantly more revenue than other MLB clubs), available at <http://espn.go.com/mlb/state/solutions.html>; Edward Mathias, *Squeeze Play: Will Baseball’s Economic Problems Cause More Legal Headaches for the National Pastime?*, 5 SPORTS LAW. J. 249, 255 n.33 (1998) (noting that the New York Yankees and Milwaukee Brewers, the MLB clubs with the greatest and least local media revenues in 1996, received \$59 million (U.S.) and \$4.3 million (U.S.), respectively, from this source).

84. Mathias, *supra* note 83, at 255 (“Teams in the biggest markets have been able to secure more lucrative local television contracts, allowing them to outspend so-called ‘small-market teams’ for talent.”).

85. Sean McAdam, *The Rich Get Richer and ...*, ESPN.COM (Feb. 4, 1999) (noting that the removal of player mobility restraints in 1976 and the corresponding increase in players’ salaries have heightened the effect of revenue disparity between MLB clubs on competitive balance in the league), available at <http://espn.go.com/mlb/state/daythree.html>.

86. *Id.*

87. Bodley & Brady, *supra* note 80 (noting that “for most teams” the 1999 MLB season was over before it began), available at <http://espn.go.com/mlb/state/solutions.html>.

88. Bob Klapisch, *Root for the Underdog? Only if There Was One*, ESPN.COM (Feb. 3, 1999) (showing the payroll rankings for the World Series teams from 1990-1998), available at <http://espn.go.com/mlb/features/01082162.html>; 1999 *Team Payrolls*, USATODAY.COM (showing

Due to its competitive imbalance problem, MLB has lost the interest of many fans, which has had a negative financial impact on individual clubs as well as the league as a whole.<sup>89</sup> A comparison of MLB's television contracts with those of the other American established leagues shows that the lack of competitive balance in MLB has had a deleterious effect on the league. Under their television contracts, the NBA, NFL, and NHL, which have greater revenue sharing among their individual clubs than MLB does, receive a fixed sum in exchange for their television rights.<sup>90</sup> Though it used to receive a guaranteed sum from its television rights purchasers, MLB's current television contracts do not promise the league a fixed sum.<sup>91</sup> Rather, MLB receives a fixed percentage of the advertising revenues the media companies receive during MLB telecasts.<sup>92</sup> Hence, MLB's return from its sale of television rights is more closely indexed to consumer interest in the league than the returns other leagues receive from the sale of their television products. Because its popularity has dwindled in recent years, MLB has lost bargaining power with mega-media companies and has had to shoulder more of the risk of attracting television viewers than the other American established leagues have had to bear.<sup>93</sup> Given the effect the lack of competitive balance has had on the league, it is not surprising that the commissioner of MLB—the head of its “league office”—has identified the disparity between “rich” and “poor” clubs as the most troubling problem currently facing the league.<sup>94</sup>

MLB has tried to address its competitive imbalance problem. In 1994, the owners proposed adopting a revenue sharing agreement on the condition that the players accept a salary cap. The owners and players could not agree on this issue with the result being a labor dispute that caused the cancellation of

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that the New York Yankees, victors in the 1999 World Series, had the largest payroll for the 1999 season, \$91,990,955 (U.S.), available at <http://www.usatoday/sports/baseball/salary/99team.htm> (last visited Nov. 10, 1999).

89. Rob Neyer, *Wait 'Til Next Year*, ESPN.COM (Feb. 5, 1999) (noting that the declining attendances at MLB games in Kansas City, Montreal, Pittsburgh, and Minneapolis, all “poor” clubs, reflect the loss of interest in MLB by the fans in those cities), available at <http://espn.go.com/mlb/state/neyer.html>.

90. *In re Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 F.C.C.R. 3440 ¶ 33 n.47 (1994) [hereinafter *Anti-siphoning Final Report*] (noting that the NBA's and NFL's television contracts guarantee the leagues fixed amounts).

91. *Id.* ¶ 33 & n.40 (noting that MLB's television contracts no longer guarantee it a fixed sum).

92. *Id.* ¶ 28 (describing MLB's television contracts).

93. *Id.* ¶ 33 (noting that MLB's television contracts illustrate “that MLB has been forced to accept more risk than other professional sports leagues”).

94. David Schoenfield, *Success, but at What Price?*, ESPN.COM (Feb. 2, 1999) (noting that the MLB Commissioner has established a “Blue Ribbon Task Force” to study the league's competitive imbalance problem), available at <http://espn.go.com/mlb/features/01079734.html>.

the remainder of the 1994 season and delayed the start of the 1995 season.<sup>95</sup> This disagreement among the owners and players upset many MLB fans.<sup>96</sup> As a result, attendance at MLB games in 1995 decreased by twenty percent and league revenues dropped by more than \$900 million in 1994-95.<sup>97</sup> Ultimately, the owners and players agreed to a "luxury tax" arrangement. Under this agreement, the top six teams in revenue each year contribute funds to a common pool that the league office then distributes to the six teams that have the lowest revenue.<sup>98</sup> According to most observers of MLB, the luxury tax has done little, if anything, to decrease the disparity in revenues and team quality between the "rich" and "poor" clubs.<sup>99</sup>

The reason an individual club is unwilling to enter into a revenue sharing agreement in a traditional league is because the costs of competitive imbalance are largely external to the club distorting league parity.<sup>100</sup> As one commentator has explained:

The situation is analogous to the traditional production externality problem. The improvement of a better than average team results in diseconomies which are external to the club in question but internal to the league. Likewise, the improvement of a poor team results in benefits to the league as a whole over and above those that accrue to that individual club. It cannot be expected that the club will consider these external effects of its decisions in determining the level of its team quality.<sup>101</sup>

Though MLB's competitive imbalance problem is worsening,<sup>102</sup> whether the league can devise an effective solution is not certain. Because of the ineffectiveness of the luxury tax, MLB owners decided in January 2000 to delegate to the commissioner of the league the task of increasing parity among

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95. Mathias, *supra* note 83, at 258-59.

96. *Id.* at 258 (noting that many fans were upset about the industrial dispute in MLB in 1994).

97. *Id.* at 258-59 (reporting the effects from the industrial dispute in MLB in 1994).

98. Bodley & Brady, *supra* note 80 (describing the "luxury tax" system in MLB), available at <http://espn.go.com/mlb/state/solutions.html>.

99. *Id.* ("The luxury tax has had no effect at all, far as I can tell." (quoting Bill Giles, owner of the Philadelphia Phillies)).

100. DEMMERT, *supra* note 66, at 14 (noting that the pennant race "is primarily external to the production process of any individual club . . .").

101. *Id.* at 29.

102. McAdam, *supra* note 85 (stating that the commissioner of MLB, in his own words, realizes that the league's disparity problem is "getting worse"), available at <http://espn.go.com/mlb/state/daythree.html>; Associated Press, *McClatchy Declares Progress for Plan*, ESPN.COM (Nov. 30, 1999) [hereinafter *McClatchy*] (noting that in 1999 the eight teams in the playoffs were "among franchises with the 12 highest payrolls, while teams with the lowest payrolls finished with losing records"), available at <http://espn.go.com/mlb/news/1999/1129/203456.html>.

the teams.<sup>103</sup> The owners unanimously requested the commissioner, pursuant to his authority to act in the “best interests of the game,” to “take such action as he deems appropriate to ensure an appropriate level of long-term competitive balance.”<sup>104</sup> The commissioner’s power to act in the best interests of the game now trumps all league rules, including the one that requires three-fourths of the owners to agree to any revenue sharing.<sup>105</sup> Actions the commissioner can take to further competitive balance in the league include blocking player trades and redistributing league revenues in favor of poor clubs.<sup>106</sup> In addition to increasing the commissioner’s power, the owners agreed to transfer to the commissioner’s office all of their Internet transmission rights.<sup>107</sup> The commissioner has complete discretion to distribute revenues from the sale of Internet transmission rights to promote competitive balance in the league.<sup>108</sup>

The owners’ unanimous agreement to these provisions shows a greater degree of cooperation than has been present in past years.<sup>109</sup> By delegating resolution of this issue to the commissioner the owners have effectively conceded, however, their inability to reach an agreement among themselves as to the precise means to implement revenue sharing.<sup>110</sup> In effect, the owners have agreed that they cannot work together to solve the greatest problem facing the league.

Whether empowering the commissioner with the authority to override the owners’ individual interests for the best interests of the game will improve parity in MLB is questionable. The commissioner’s new powers are temporal and voidable upon agreement of the owners. “Until January 1994, the commissioner could use his ‘best interests’ authority for virtually anything” including estopping an owner from taking action that harmed competitive balance.<sup>111</sup> At that time, however, the owners “gutted”<sup>112</sup> the commissioner’s

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103. Associated Press, *Selig Can Block Trades, Redistribute Wealth*, ESPN.COM (Jan. 25, 2000) [hereinafter *Selig*], at <http://espn.go.com/mlb/news/2000/0119/300929.html>.

104. *Id.* (quoting owners’ resolution to increase commissioner’s authority to act in the best interests of the game).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* (noting that the owners’ agreement to these propositions would have been “inconceivable 10 or 12 years ago” (quoting Bud Selig, MLB commissioner)).

110. *Id.* (noting that the owners’ action showed that they were “unable to save themselves”).

111. *Id.* (noting that commissioner Bowie Kuhn precluded Charlie Finley, owner of the Oakland club, from selling top players to other clubs for cash); *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978) (holding that Kuhn’s best interests authority as MLB commissioner gave him the power to block Finley’s transactions as a means to promote competitive balance in the

power because they were concerned that some previous commissioners were not sufficiently solicitous of their interests.<sup>113</sup> Prior to the owners' decision in January 2000, the commissioner could not use his best interests authority "on any matter subject to a vote by [the] owners."<sup>114</sup> Since the commissioner's authority, not to mention his continued employment, depends on maintaining the support of a majority of the owners, he may be unwilling to take drastic steps to improve competitive balance. To succeed, the commissioner must act in favor of the poor clubs, while simultaneously sustaining a consensus among rich clubs who may very well be harmed by his actions. Balancing the interests of the various owners is likely to be particularly difficult if the commissioner decides to grant poor clubs a disproportionate percentage of the league's revenues.

In addition to ultimate oversight by the owners, the commissioner's actions are likely to attract scrutiny from the players. The players can challenge any decision of the commissioner with respect to revenue distribution that touches upon their collective bargaining agreement with the owners.<sup>115</sup> The players are not likely to agree to any activity that reduces competition between the clubs for players' services or that depresses players' salaries.

The significance of the owners' agreement to transfer their Internet transmission rights to the commissioner is also unknown. Currently, revenues from the sale of Internet rights are miniscule compared to the revenues from the sale of television rights. The future value of Internet rights cannot be measured with any accuracy. If the league ever receives substantial revenues from the sale of Internet rights, then a distribution of this income in favor of the poor clubs may rectify the competitive imbalance problem in MLB. The expectation of large future revenue streams from Internet transmissions does not, however, ameliorate the negative effects of financial disparity currently present among clubs in MLB.

The plight of MLB illustrates that the structure of a traditional professional sports league is not conducive to the creation of a system designed to promote competitive balance. Recent experiences in other established American leagues show that even where a traditional league has

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league), *cert. denied*, 439 U.S. 876 (1978).

112. *Selig*, *supra* note 103, at <http://espn.go.com/mlb/news/2000/0119/300929.html>.

113. Hal Bodley, *Selig About to Get Bigger Bat*, USATODAY.COM (Jan. 18, 2000) (noting that MLB owners had "concern about some previous commissioners'" (quoting Drayton McLane Jr., owner of the Houston Astros)), available at <http://www.usatoday.com/sports/baseball/mlbfs45.htm>.

114. *Selig*, *supra* note 103, at <http://espn.go.com/mlb/news/2000/0119/300929.html>.

115. *Id.*

implemented a system to promote parity the need for cooperation among league participants may retard the effectiveness of its efforts. Moreover, attempts by individual clubs to circumvent the league's competitive balance system often spawn new, and often unforeseen, problems.

*B. Franchise Free Agency in the NFL*

Unlike MLB, the NFL has implemented a comprehensive system to achieve competitive balance. The individual clubs share equally all revenues from the sale of television rights and league merchandise.<sup>116</sup> The club hosting a regular season game splits its gate receipts 60%/40% with the visiting club.<sup>117</sup> "As a result, upwards of ninety percent of all NFL revenue is shared equally among all its . . . teams."<sup>118</sup> In addition, the league has a salary cap to which the players' association has given its approval.<sup>119</sup> The salary cap "set[s] each team's total payroll at a fixed percentage of its equal share of the League's revenues . . ."<sup>120</sup> The salary cap promotes competitive balance by giving each club the same resources to fund player payments and stabilizes player costs by indexing players' salaries to the league's principal revenue streams.<sup>121</sup> Because of its revenue sharing and salary cap arrangement, the NFL, unlike MLB, does not suffer from extreme disparity in playing ability among the individual clubs.<sup>122</sup>

The NFL's system for achieving competitive balance, however, is not perfect. In fact, a new problem—franchise free agency, where individual clubs relocate, or threaten to relocate, from one city to another in search of "sweetheart" stadium deals<sup>123</sup>—is a direct result of the league's revenue

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116. Sanjay Jose Mullick, *Browns to Baltimore: Franchise Free Agency and the New Economics of the NFL*, 7 MARQ. SPORTS L.J. 1, 12 (1996) (detailing the NFL's revenue sharing arrangement).

117. *Id.*

118. *Id.*

119. *Id.* at 13 (discussing the NFL's salary cap).

120. *Id.*

121. *Id.* at 13-14.

122. *Id.* at 12 (noting that the NFL's revenue sharing arrangement has "eliminated the extreme competitive inequities that exist in sports without such extensive revenue sharing"); Greg Garber, *On Any Given Sunday . . . Who Knows?*, ESPN.COM (Aug. 31, 1999) (noting that 33.6% of the games halfway through the NFL's 1999 season had been decided by three points or less), at <http://espn.go.com/nfl/midseason/garber.html>.

123. Katherine C. Leone, Note, *No Team, No Peace: Franchise Free Agency in the National Football League*, 97 COLUM. L. REV. 473, 474 n.8 (1997) ("The term 'franchise free agency' describes the recent tendency of owners to move their teams to cities offering the best financial package."). A "sweetheart deal" typically allows the relocating club to receive all stadium related revenues and use of the stadium rent free. *Id.* at 486-87 (describing the agreements between the city of Baltimore and Art Modell, owner of the former Cleveland Browns/Baltimore Ravens, and the city

sharing and salary cap arrangement.<sup>124</sup> Individual NFL club owners seek favorable agreements from stadium owners because non-ticket revenues from a club's stadium (*e.g.*, sale of luxury suites, concessions, parking) are excluded from the league's revenue sharing arrangement.<sup>125</sup> Club owners want to maximize their stadium revenue not only to increase the return on their investments in purchasing NFL clubs, but also to procure a steady supply of cash with which to pay large signing bonuses to star players.<sup>126</sup> Paying a player a large signing bonus is the principal means used to circumvent the NFL's salary cap since under the collective bargaining agreement a signing bonus is prorated over the life of the player's contract.<sup>127</sup> Through the use of a signing bonus, a club can offer a player a more lucrative contract and have more room under the salary cap to sign other players.<sup>128</sup>

Though the NFL currently enjoys great consumer support from live spectators and television viewers,<sup>129</sup> franchise free agency threatens the continued economic viability of the league. One commentator notes the harm from franchise free agency:

A sports league has a strong interest in franchise stability and is collectively harmed by its member teams' exercise of opportunistic behavior and franchise free agency. This conduct breaks down the symbiotic relationship between teams and their host communities. Eventually, city taxpayers may be unwilling to provide publicly owned and subsidized playing facilities for teams that can casually relocate despite a history of fan support that has enabled the franchise to be profitable. Without taxpayer subsidies, leagues may be unable to field competitive teams in optimal geographical locations.

Opportunistic relocation also hurts a league's good will and fan loyalty, especially if it disrupts geographical balance and causes the elimination of traditional rivalries among teams. Game attendance may decline and reduce the league's overall gate revenues and

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of Nashville and Bud Adams, owner of the former Houston Oilers/Tennessee Titans).

124. *Id.* at 477 (noting that franchise free agency "may be the biggest problem the league has ever faced" (quoting the late Pete Rozelle, former commissioner of the NFL)).

125. Mullick, *supra* note 116, at 15-16 (discussing the non-ticket stadium revenue excluded from the NFL's revenue sharing arrangement).

126. *Id.* at 14-19 (discussing the reasons why NFL owners desire the cash flow from playing facilities).

127. *Id.* at 14 (discussing the treatment of signing bonuses under the NFL's salary cap).

128. *Id.* at 15 (noting that clubs able to pay large signing bonuses have a better chance to acquire the best playing talent in the NFL).

129. Garber, *supra* note 122 (noting that game attendance and television ratings are higher for the NFL in 1999 than they were in 1998), at <http://espn.go.com/nfl/midseason/garber.html>.

prestige, particularly if a team has committed to relocate to another city in the future. Franchise relocations may also adversely affect league media exposure. Television networks will offer less money for rights to an unstable product, particularly if franchises transfer out of major market areas, cumulatively reducing the nationwide viewing audience.<sup>130</sup>

Franchise free agency may also cause a professional sports league in the United States to lose substantial expansion fees, which are shared equally among all the clubs, if a club presently in the league moves to a city that could have supported an expansion team.<sup>131</sup> Though a league may charge a club moving to a new city a "relocation fee," this amount is usually much less than the "expansion fee" a new entrant is required to pay. For example, the relocation fee when the Rams moved from Los Angeles to St. Louis in 1995 was \$71 million (U.S.);<sup>132</sup> however, in 1999 the expansion fee for the newest NFL franchise was \$700 million (U.S.).<sup>133</sup>

Traditional American leagues are not very effective in preventing individual clubs from relocating. "Because of the importance of maintaining stable franchises and preventing unwarranted team movements, leagues require super-majority *de jure* approval before a franchise is permitted to relocate; however, this is often a meaningless requirement *de facto*."<sup>134</sup> "[F]reely permitting franchise movement enables all member teams to use the threat of future relocation to enhance their bargaining power in stadium

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130. Mitten & Burton, *supra* note 9, at 103 (citations omitted). Though the NFL did not have a club in Los Angeles, *see* Mason & Slack, *supra* note 55, at 416 (noting that before the 1995 season the Los Angeles Rams moved to St. Louis and the Los Angeles Raiders moved back to Oakland), the league was still able to negotiate substantial increases for its television rights in its most recent television contracts. *See also* Rick Churchill, *Sports Rights Scorecard: Who Pays What to Bring the Big Games to the Little Screen*, BROADCASTING & CABLE, July 12, 1999, at 27 (noting that the NFL's current television contract is the richest in the history of professional sports leagues). The NFL's large television contracts can be attributed in part to its having a club in each of the top 25 television markets in the United States, except for Los Angeles, which is the second largest television market. Mason & Slack, *supra* note 55, at 416 n.72 (noting that but for Los Angeles, the NFL "has clubs in the twenty five largest centers in the US"); *Houston Gets Expansion Franchise*, ESPN.COM (reporting the NFL's award of an expansion franchise to Houston, the eleventh largest television market in the United States, instead of Los Angeles), at <http://espn.go.com/nfl/news/1999/1005/98576.html> (last visited Oct. 7, 1999).

131. Mason & Slack, *supra* note 55, at 416 (noting that a drawback to a league from "unwarranted franchise movement" is that "the league will forego any expansion fees that would be obtained by an expansion franchise in the new location").

132. Mullick, *supra* note 116, at 7 (noting the Rams' \$71 million relocation fee).

133. *Houston Gets Expansion Franchise*, *supra* note 130 (reporting that the expansion fee for the new Houston franchise was \$700 million), at <http://espn.go.com/nfl/news/1999/1005/98576.html>.

134. Mitten & Burton, *supra* note 9, at 103.



negotiations with their host cities.”<sup>135</sup> Moreover, an individual club may be hesitant to vote against another club’s proposed relocation for fear that the club denied relocation may object to the movement of other clubs in the future.<sup>136</sup> Rather than a concern for the overall financial health of the league, personal animosity towards the owner of the moving club and other political factors are the basis for most majority attempts to block a club’s relocation.<sup>137</sup> The Ninth Circuit’s decision in *Los Angeles Memorial Coliseum Comm’n v. NFL*<sup>138</sup> that the NFL and its members “violated the antitrust laws by voting against the proposed move of the Oakland Raiders to Los Angeles”<sup>139</sup> also deters traditional leagues from challenging a club’s relocation.<sup>140</sup>

The NFL employs two tactics to prevent franchise relocations. First, the NFL lobbies local governments to provide public financing to build a new stadium for the club in its existing market.<sup>141</sup> Despite overwhelming evidence that the expenditure of public monies to construct a playing facility is an unsound investment,<sup>142</sup> the NFL effectively uses the threat of a club’s relocating to convince state and local governments to contribute substantial sums to fund stadium construction.<sup>143</sup> The NFL’s lobbying efforts are now particularly intense after the public backlash following the move of the Cleveland Browns to Baltimore in 1995.<sup>144</sup> Though it may temporarily stop some clubs from relocating, arguably the NFL’s lobbying efforts do not represent a long-term solution to the franchise free agency problem since they do not touch upon the causes of the dilemma. Even if a club obtains a new stadium, the NFL cannot guarantee that the club will not later vacate the city in response to a better offer.

Second, the NFL provides partial backing for the private financing a club

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135. *Id.* at 103-04.

136. *Id.* at 104.

137. *Id.*

138. 726 F.2d 1381 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984).

139. Mitten & Burton, *supra* note 9, at 104.

140. Leone, *supra* note 123, at 499 (noting that the NFL has read *Los Angeles Coliseum Comm’n* broadly and taken a passive stance toward franchise relocations).

141. Greg Garber, *New Stadiums Are Works of Art*, ESPN.COM, at <http://www.espn.go.com/nfl/columns/garber/01221688.html> (last visited Apr. 23, 1999).

142. Joseph L. Bast, *Sports Stadium Madness: Why It Started, How to Stop It*, HEARTLAND POLICY STUDY (“All available data suggest that continued public investment in sports stadiums is madness.”), available at <http://www.heartland.org/sprtsstad.htm> (last visited June 11, 1999).

143. Garber, *supra* note 141 (noting that the NFL has effectively used the threat of a club’s relocation to pressure local governments into providing funds for stadium construction), at <http://www.espn.go.com/nfl/columns/garber/01221688.html>.

144. *Id.* (noting the NFL’s remarkable success in the past three years in obtaining public financing for stadium construction or renovation for its member clubs).

acquires to help fund stadium construction.<sup>145</sup> The NFL supplies collateral for up to 50% of private financing for clubs in the top six television markets and 34% of private financing for all other clubs.<sup>146</sup> By providing more collateral to clubs in the top six television markets, the NFL appears more concerned with preventing clubs from moving out of the top media centers than with precluding relocations in general.<sup>147</sup> Some NFL owners object to the league's policy on the grounds that it unreasonably favors large market clubs.<sup>148</sup> The effectiveness of this part of the NFL's policy in deterring franchise relocations is questionable.<sup>149</sup> The policy merely aids a club in obtaining private funds at a lower interest rate for the construction of a new stadium, irrespective of where the new stadium is built. The policy does not speak to the underlying causes of franchise free agency such as the league's unwillingness to require increased revenue sharing of non-ticket stadium revenues and does not proscribe or punish the movement of a club to another geographic location.

Since traditional leagues are not preventing franchise free agency, many commentators believe that the United States Congress should address this issue.<sup>150</sup> According to these commentators, congressional action is appropriate because a municipality, which has expended scarce public resources to build a playing facility for a privately owned club in an established league, suffers great harm when the club relocates prior to the expiration of its lease.<sup>151</sup> A city cannot recoup its losses from a club's relocation by a breach of contract suit because an award of damages would not include the non-rent direct economic benefits (e.g., a club's payment of taxes), indirect economic benefits (e.g., jobs created from the club's presence in the community), or intangible benefits (e.g., increased prestige) for which the city

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145. Associated Press, *Stability Goal of New NFL Policy*, ESPN.COM (May 26, 1999) (detailing the NFL's stadium collateral policy), at <http://www.espn.go.com/nfl/news/1999/990526/01277298.html>.

146. *Id.* (detailing the NFL's stadium collateral policy).

147. *Id.* ("It's a crucial policy for the league to have strong footing in the largest media markets." (quoting Jeffery Lurie, owner of the NFL's Philadelphia franchise, a beneficiary of the NFL's policy)).

148. *Id.* ("It's a tax on all the teams that won't benefit. Never before in the history of the league have the poor given to the rich." (quoting Al Davis, owner of the Oakland Raiders)).

149. For example, despite the NFL's collateral policy, Robert Kraft, owner of the New England Patriots, was planning on moving his club to Connecticut until the State of Massachusetts agreed to spend \$70 million on roads and other improvements for a new stadium at the club's current location. *Id.* (discussing the proposed move of the New England Patriots).

150. Leone, *supra* note 123, at 510-11 (advocating congressional action); Mitten & Burton, *supra* note 9, at 128 (arguing that congressional legislation is necessary to solve the problem of franchise free agency).

151. Leone, *supra* note 123, at 523 (noting that Congress should act to protect the cities that are victims of franchise free agency).

bargained when it agreed to build the playing facility for the club.<sup>152</sup>

Many of the legislative proposals to solve the franchise free agency problem focus on granting traditional leagues a limited exemption from the antitrust laws to control relocations. In exchange for a limited antitrust exemption, the league would be required to apply objective criteria in determining whether to allow a club to relocate, block any move prior to a city's retiring its debt for building the playing facility, reserve the relocating club's logos and trademarks for the new team the city will receive when the league decides to expand, and allow public ownership of clubs.<sup>153</sup> Other proposals call for Congress to mandate the expansion<sup>154</sup> or divestiture<sup>155</sup> of American established professional sports leagues in order to increase the supply of professional sports teams. To date, Congress has not enacted any of these proposed legislative solutions.

Like with other issues involving the creation or maintenance of competitive balance in a traditional professional sports league, franchise free agency involves a situation where an individual club is not forced to internalize the externalities of unilateral action.<sup>156</sup> The NFL's inability to address adequately franchise free agency is further evidence that the organizational structure of traditional leagues impedes the resolution of competitive balance problems.<sup>157</sup>

## II. LABOR MARKET PROBLEM: MINIMUM AGE REQUIREMENT IN THE NBA

The current controversy surrounding the NBA's efforts to establish a minimum age restriction for incoming players also demonstrates that the structure of a traditional league can adversely affect a league's operation.

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152. *Id.* at 491-92 (discussing the direct and indirect economic and intangible benefits a municipality receives from hosting a club in an established professional sports league).

153. *Id.* at 523 (discussing conditions for limited antitrust exemption in exchange for league control over franchise relocations); Mitten & Burton, *supra* note 9, at 137-38 (same); Hartel, *supra* note 35, at 592 (noting bill in Congress concerning public ownership of professional sports clubs). See also *infra* notes 483-94 and accompanying text (discussing the public ownership of clubs as a means for a media league to avoid the franchise free agency problem).

154. Mullick, *supra* note 116, at 33 (proposing that in exchange for an antitrust exemption Congress should require professional sports leagues to expand when their television revenues increase by a certain percentage or dollar amount).

155. Ross, *supra* note 9, at 748-49 (arguing for Congress to break up both the NFL and MLB into three separate rival leagues).

156. Mitten & Burton, *supra* note 9, at 102 (noting that an individual club internalizes only a fraction of the harm from its relocation to another geographic area); Mullick, *supra* note 116, at 29 (same).

157. Mason & Slack, *supra* note 55, at 424 (predicting that the negative effects of franchise free agency will continue in the future because of the "unique structure of professional sports leagues").

The number of players entering the NBA prior to their graduation from, or even matriculation into, college is rapidly increasing.<sup>158</sup> The NBA is currently trying to slow or eliminate this influx because of the detrimental effects it is having on the league.<sup>159</sup> With more young players on teams, the overall quality of play in the league is decreasing.<sup>160</sup> Many of the "early entry" players lack the skills needed to perform competently at the highest professional level.<sup>161</sup> The NBA also suffers from bad publicity about its employment rules, which tarnish its image with purchasers of its products. Many critics claim that the NBA is tempting young players to eschew the opportunity of a university education for the allure of riches from a professional career.<sup>162</sup> Others blame the NBA for the tragic accounts of young players who enter the league only to learn that they lack the life skills needed to cope with being a professional basketball player.<sup>163</sup> Finally, the NBA's employment policy strains its relationship with the National Collegiate Athletic Association (NCAA). The NCAA provides the NBA with most of its players at little or no direct cost to the league. The early exodus of the best college players reduces the quality of the NCAA's basketball competition,<sup>164</sup> a

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158. Greg Collins, *NBA Life Closer Than Ever*, ESPN.COM (July 27, 1999) (noting that the number of college underclassmen and high school players entering the NBA has more than doubled in the past four years), at <http://espn.go.com/ncb/preppro/main.html>; Scott R. Rosner, *Must Kobe Come Out and Play? An Analysis of the Legality of Preventing High School Athletes and College Underclassmen from Entering Professional Sports Drafts*, 8 SETON HALL J. SPORT L. 539, 539-40 (1998) ("Over the last several years, the number of high school graduates and college underclassmen applying for early entry into the rookie drafts of the various professional sports leagues has reached nearly epidemic proportions. Especially noteworthy has been the mass exodus of college athletes into the [NBA] and [NFL].").

159. Jay Bilas, *A Legal Look at Early Entry*, ESPN.COM (July 26, 1999) (noting the NBA's efforts to stop the flow of young players into the league), at <http://espn.go.com/ncb/preppro/bilasage.html>. The commissioner of the NBA believes that the acceleration of young players into the league is "one of the [NBA's] most difficult" issues. Tom Weir, *NBA Worried Draftees Are Too Young*, USATODAY.COM (June 30, 1999) (quoting NBA Commissioner David Stern), available at <http://www.usatoday.com/sports/ccovwed.htm>. See also Rosner, *supra* note 158, at 550.

160. Rosner, *supra* note 158, at 542 n.18 ("Many NBA coaches and players feel that the increased number of early entrants is already harming the league.").

161. *Id.* (noting NBA coaches' and players' concern with the skills of early entry players).

162. *Id.* at 542 (noting the criticism the NBA has received for "enticing" athletes with million dollar contracts).

163. Mike Lopresti, *Smith's Broken Dream Sends a Warning*, USATODAY.COM (Dec. 6, 1999) (noting that the "NBA draft . . . exposes teen-agers to the live ammunition of money and fame, before many are emotionally ready"), available at <http://www.usatoday.com/sports/comment/collopo.htm>.

164. Bilas, *supra* note 159 (noting that the increase in the number of college underclassmen going to the NBA has had a "clear detrimental effect" on the overall level of play in college basketball), at <http://espn.go.com/ncb/preppro/bilasage.html>.

key revenue source for the association.<sup>165</sup>

The NBA has not always allowed college underclassmen and high school players to play in the league. "Prior to 1971, the NBA By-laws prohibited the drafting of an athlete until four years after his high school graduation."<sup>166</sup> Spencer Haywood, three years out of high school, successfully challenged the NBA's rule in federal court, however, after the league barred him from playing for a NBA club during the 1970-71 season.<sup>167</sup> The court held that the NBA's rule was a group boycott and per se illegal under section 1 of the Sherman Act.<sup>168</sup> According to the court, the NBA and its teams conspired to create "an arbitrary and unreasonable restraint upon the rights of Haywood and other potential NBA players to contract to play for NBA teams. . . ."<sup>169</sup> Other courts have followed this precedent and held the entry rules of other traditional leagues, whether based on a player's particular age or on the number of years since a player's class graduated from high school, to be illegal under the Sherman Act.<sup>170</sup> As a result of these rulings, the NBA's currently policy permits any player whose high school class has graduated to sign with an individual club in the league.<sup>171</sup>

Due to its organizational structure, the NBA faces a formidable task in trying to restrict the flow of young players into the league. Though the commissioner of the NBA supports a rule requiring all players to be at least twenty years of age,<sup>172</sup> such a change would most likely have to be incorporated into the league's collective bargaining agreement.<sup>173</sup> Despite the significant influence of the present NBA commissioner on league affairs,<sup>174</sup>

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165. Michael Hiestand, *CBS Keeps NCAA Men's Tournament* [sic], USATODAY.COM (Nov. 19, 1999) (reporting that CBS agreed to purchase the transmission rights to the NCAA's men's basketball tournament for \$545 million (U.S.) per year through the year 2013), available at <http://www.usatoday.com/sports/sfri12.htm>.

166. Rosner, *supra* note 158, at 550.

167. *Id.* at 551 (discussing Haywood's suit against the NBA).

168. *Denver Rockets v. All-Pro Management, Inc.*, 352 F. Supp. 1049, 1067 (C.D. Cal. 1971) (declaring the NBA's employment rule to be illegal under § 1 of the Sherman Act).

169. *Id.* at 1056.

170. *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1323 (D. Conn. 1977) (holding the WHL's rule requiring all players to be at least 21 years of age to be a group boycott and per se illegal); *Boris v. United States Football League*, 1984-1 Trade Cases ¶ 66,012, 1984 WL 894, at \*1 (C.D. Cal. Feb. 28, 1984) (concluding that the USFL's eligibility rule restricting a player from entering the league until all his college football eligibility had expired was a group boycott and per se illegal); Rosner, *supra* note 158, at 553-55 (discussing *Linseman* and *Boris*).

171. Rosner, *supra* note 158, at 553.

172. Weir, *supra* note 159 (noting David Stern's support for a 20-year-old entry age limit for the NBA), available at <http://www.usatoday.com/sports/ccovwed.htm>.

173. Bilas, *supra* note 159, at <http://espn.go.com/ncb/prepro/bilasage.html>.

174. Bruce Schoenfeld, *David Stern's Full-Court Press*, N.Y. TIMES, Oct. 18, 1998 (Magazine),

the increasing employment of young players by individual clubs, irrespective of the effect on the overall health of the league, indicates that some owners may be less than willing to agree to a new player entry rule.<sup>175</sup> Further, the fear of antitrust liability deters the NBA from unilaterally imposing a new early entry rule.<sup>176</sup> Before implementing any new entry rule, the NBA needs the agreement of the NBA Players' Association in order to shelter the rule from antitrust attack under the nonstatutory labor exemption.<sup>177</sup>

The nonstatutory labor exemption immunizes from antitrust scrutiny a provision of a collective bargaining agreement that "primarily affect[s] only the parties to the collective bargaining agreement, concern[s] a mandatory subject of bargaining, and [is] a product of bona fide arm's length bargaining."<sup>178</sup> Assuming good faith negotiations between the NBA owners and Players' Association, an early entry rule included in a collective bargaining agreement would likely survive antitrust attack.<sup>179</sup> Collective bargaining is the only effective means for a traditional league to implement player eligibility restrictions.<sup>180</sup> To date, the NBA Players' Association refuses to support a fixed age restriction on incoming NBA players, primarily because the owners have not offered any substantial concessions in exchange for the union's consent.<sup>181</sup>

Because the individual clubs are unwilling to grant the Players' Association a concession in exchange for its support of a minimum age restriction, the NBA is trying to rectify the effects of the early entry problem by means other than formulating a new early entry rule. In particular, the

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at 96 (noting David Stern's extensive control over the NBA's affairs).

175. Collins, *supra* note 151 (noting that individual clubs have reaped rich financial returns from signing early entry players), at <http://espn.go.com/ncb/prepro/main.html>.

176. Rosner, *supra* note 158, at 572 (concluding that a traditional professional sports league's unilateral imposition of an early entry rule would most likely run afoul of § 1 of the Sherman Act, even under a rule of reason analysis).

177. *Id.* at 563 (noting that inclusion of an early entry rule in the collective bargaining agreement between a league and the players' association gives it the protection of the nonstatutory labor exemption).

178. *Id.* (discussing the requirements of the nonstatutory labor exemption).

179. *Id.* at 563-67 (answering in the affirmative the question of whether the "non-statutory labor exemption would apply to an agreement by the players' association and management to include draft eligibility rules in the collective bargaining agreement and thereby avoid antitrust scrutiny").

180. Bilas, *supra* note 159 ("The only plausible way for an age restriction to survive legal scrutiny would be for the rule to be included as a mandatory subject of collective bargaining, and agreed upon by the players union."), at <http://espn.go.com/ncb/prepro/bilasage.html>.

181. Rosner, *supra* note 158, at 570 (noting that "[t]he owners would have to make a sizeable concession in another area for" the players' association to agree to a new early entry rule); Bilas, *supra* note 159 (noting that the NBA has yet to offer the players' association anything in return for its support of a minimum age restriction), at <http://espn.go.com/ncb/prepro/bilasage.html>.

NBA now enforces more strictly its playing rules prohibiting a defensive player from making body contact with an offensive player.<sup>182</sup> Through this policy, the NBA hopes to quicken the tempo of the game, reduce physical play and reward finesse over power.<sup>183</sup> The NBA's ultimate goal is to make games more exciting and entertaining, which usually correlates with high scoring contests.<sup>184</sup> A less physical, finesse-oriented style of play is generally better suited for early entry players, many of whom lack the physical maturity of older NBA players.<sup>185</sup> This program to offset the effects of increasing numbers of early entry players—instructing referees, over whom it has direct control, to enforce rules more closely—is one of the few actions the NBA can perform unilaterally without the approval of a majority of the clubs or the Players' Association. Whether the NBA's strategy lessens the need for future negotiation with the Players' Association on the minimum age issue is uncertain. Continued decreases in television ratings for NBA telecasts (down 16% and 23% for free-to-air and cable telecasts, respectively, from the 1998-1999 to the 1999-2000 season) calls into question the effectiveness of the league's solution.<sup>186</sup>

The NBA's difficulty in addressing the early entry problem highlights the imperative for cooperation among the individual clubs and between the clubs and the players' association for the resolution of labor market issues in a traditional league.

### III. CONFLICT BETWEEN INDIVIDUAL CLUBS AND A CENTRAL COMPETITION ORGANIZER: REDUCTION OF INDIVIDUAL CLUBS IN THE NATIONAL RUGBY LEAGUE

Like in traditional American leagues, many problems arise in Australian leagues because league participants pursue their own agendas rather than work cooperatively for the best interests of the league. The reduction of clubs in the NRL illustrates the conflict that often exists between the central competition organizer and individual clubs of a traditional Australian league.

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182. Boeck, *supra* note 70 (discussing the NBA's rule modifications for the 1999-2000 season), available at <http://www.usatoday.com/sports/basketba/99pre/full07.htm>.

183. *Id.* (reporting on the objectives of the NBA's rule changes).

184. *Id.* (noting that the NBA Commissioner hopes that the rule changes will make the league's product more "enjoyable to those absorbing it").

185. *Pacers' Bender May Debut vs. Spurs*, ESPN.COM (Dec. 7, 1999) (noting the physical attributes of young players in the NBA), at <http://espn.go.com/nba/news/1999/0804/39601.html>.

186. Rudy Martzke, *Kellogg's Close-Game Forecast On Target*, USATODAY.COM (noting drop in television ratings for NBA games), available at <http://www.usatoday.com/sports/comment/colmart.htm> (last visited Mar. 17, 2000).

The genesis of the NRL was a meeting on December 19, 1997, in Sydney, Australia, involving the Australian Rugby Football League Ltd. (ARL), the established central competition organizer, and the individual clubs in the ARL (the "ARL clubs").<sup>187</sup> The ARL's goal at this meeting was to convince the ARL clubs to accept the terms of a proposed merger agreement with News Ltd., the central competition organizer of Super League, a rival rugby league entity. At this time, the ARL had twelve clubs, eight of which were from the Sydney metropolitan area, and Super League had ten clubs, three of which were Sydney-based.<sup>188</sup>

The merger proposal established a framework to reduce the number of clubs in the combined league. Specifically, twenty, sixteen, and fourteen clubs would play in the 1998, 1999, and 2000 seasons, respectively.<sup>189</sup> Moreover, for the 2000 season, "there would be no less than 6 teams and a maximum of 8 teams from Sydney" and "no less than 6 teams, and a maximum of 8 teams from regions outside Sydney."<sup>190</sup> Consequently, by the 2000 season the total number of clubs fielding a top grade professional rugby league team would drop from twenty-two to fourteen and the number of Sydney clubs would be reduced from eleven to no more than eight.

To determine the composition of the merged league, each club seeking entry would have to apply for a license from a new central competition organizer, NRL Co., created from a partnership between News Ltd. and the ARL.<sup>191</sup> NRL Co. would formulate criteria to be used to determine which clubs would receive licenses to play in the league, assuming that more than fourteen clubs sought admission.<sup>192</sup> NRL Co. would pay a \$2 million (Aud) grant annually to each club receiving a license to play in the league.<sup>193</sup>

At the December meeting, ten of the twelve ARL clubs voted in favor of

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187. *South Sydney District Rugby League Football Club Ltd. v. News Ltd.*, [1999] FCA 1710, at \*5 (Austl. Fed. Ct. Dec. 9, 1999) (AustLII.edu.au, Austl. Case Law) [hereinafter *South Sydney*] (discussing the meeting between Super League and the ARL). Details on Super League and the events leading to the merger of the two rival rugby league organizations are presented later in this work. See *infra* notes 846-959 and accompanying text.

188. *South Sydney*, at \*5 (AustLII.edu.au, Austl. Case Law) (noting the number of ARL and Super League clubs); *News Ltd.*, 1996 WL 33110742, at \*27 (listing Super League and ARL clubs).

189. Rugby League Proposed ARL/Super League Merger, at 17 [hereinafter Proposed Merger Agreement] (stating the number of teams for the 1998, 1999, and 2000 NRL seasons) (on file with author); *South Sydney*, at \*5, (AustLII.edu.au, Austl. Case Law) (same).

190. *South Sydney*, at \*5 (AustLII.edu.au, Austl. Case Law).

191. Proposed Merger Agreement, *supra* note 189, at 17 ("NRLC will grant licences to participate in the NRLC competition.").

192. *Id.* ("Applicants must satisfy licence criteria determined by NRLC Co.").

193. *South Sydney*, at \*5 (AustLII.edu.au, Austl. Case Law) ("A licence entitles the licensee to an annual grant of \$2 million.").



the merger proposal.<sup>194</sup> Two clubs—South Sydney (Souths) and Balmain—voted against the proposed merger.<sup>195</sup> News Ltd., which controlled Super League,<sup>196</sup> directed its clubs to approve the merger with the ARL.

In its inaugural season in 1998, the NRL had twenty clubs. Eleven of these teams were former ARL clubs (including Souths and Balmain), eight were former Super League clubs, and one was a newly formed club, the Melbourne Storm.<sup>197</sup> Early in the 1998 season, the ARL asked Souths to agree to participate in the 1998 season and to a fourteen-team competition for the 2000 season.<sup>198</sup> Souths agreed to play in the 1998 season, but reserved its right to challenge legally “any aspects of the rules of the NRL . . . particularly in relation to Souths’ rights to participate in the NRL competition from the year 2000 onwards.”<sup>199</sup>

In September 1998, NRL Co. distributed to each club the admission criteria for determining the teams for the 2000 season.<sup>200</sup> Each club selected for the 2000 season would receive a license to play in the NRL for five seasons. Under the admission process, if the number of applicants satisfying the criteria exceeded the number of available licenses, then the order of priority for awarding licenses was (in order of preference) “merged clubs” (*i.e.*, a club formed from the merger of two previously separate clubs), “regional clubs” (*i.e.*, clubs located outside the Sydney metropolitan area), and “stand alone Sydney clubs” (*i.e.*, clubs located in the Sydney metropolitan area that had not joined forces with another club in the league). The admission criteria were divided into three parts: basic criteria, qualifying criteria, and selection criteria.<sup>201</sup>

The basic criteria applied to every club seeking a license and covered the areas of playing facilities, administration, solvency, and development.<sup>202</sup> The qualifying criteria established additional licensure requirements for three

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194. *Id.* (noting voting results of ARL clubs).

195. *Id.* (noting the negative votes of South Sydney and Balmain).

196. *News Ltd.*, 1996 WL 33110742, at \*35-\*36 (noting News Ltd.’s control over Super League); Interview with David Kennedy, Solicitor, Colin Love and Co. (Sydney, Australia, Nov. 26, 1999) [hereinafter Kennedy Interview].

197. *South Sydney*, at \*6 (AustLII.edu.au, Austl. Case Law) (discussing the 1998 NRL season).

198. *Id.* (noting the request of the ARL to Souths).

199. *Id.*

200. *Id.* at \*7 (noting NRL Co.’s publication of admission criteria).

201. *A Summary of the NRL Admission Criteria*, NRL.COM.AU (summarizing the admission criteria for the rationalization of NRL clubs), available at <http://www.ntworldhost.com/14teams/criteria.html> (last visited Dec. 10, 1999).

202. *Id.* (discussing basic criteria).

particular clubs, Newcastle, Brisbane, and Auckland, New Zealand.<sup>203</sup> The selection criteria pertained to each "stand alone" club that had not already obtained a license under the qualifying criteria or was not a participant in an approved joint venture.<sup>204</sup> The selection criteria measured "crowd support, competition results, sponsorship support and finances."<sup>205</sup> In the situation where, after application of the basic and qualifying criteria, the number of clubs seeking a license exceeded fourteen, the selection criteria would be used to rank the clubs with the top fourteen clubs receiving admission into the league. October 1, 1999 was the deadline by which each club had to meet the basic criteria,<sup>206</sup> and NRL Co. would announce the clubs receiving five-year licenses on October 15, 1999, assuming application of the selection criteria was necessary.<sup>207</sup>

NRL Co. preferred to reduce the number of clubs in the Sydney area through the combination of two or more existing clubs since this would avoid the negative effects (*e.g.*, fan backlash, challenges to the reduction process) of forcibly eliminating a club from the league through application of the selection criteria.<sup>208</sup> NRL Co. encouraged amalgamation in a number of ways. The admission criteria gave preference for entry into the league to merged clubs and exempted them from the selection criteria. In practice, a merged club, to receive a five-year license, only had to meet the basic criteria and present a five-year business plan showing that it could generate \$8 million (Aud) annually in revenue.<sup>209</sup> Furthermore, the proposed merger agreement offered a \$4 million (Aud) grant for the 1999 NRL season to any "joint venture club" (*i.e.* merged club) created before December 1998.<sup>210</sup> The merger deadline was

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203. *Id.* (discussing qualifying criteria).

204. *Id.* (discussing selection criteria).

205. *Id.*

206. *NRL Media Release—Basic Criteria*, NRL.COM.AU (Oct. 1, 1999) [hereinafter *Basic Criteria*] (discussing application of the admission criteria), available at <http://www.ntworldhost.com/asp/story/asp?id=312>.

207. *A Brief History of the Issues*, NRL.COM.AU [hereinafter *Brief History*] (noting that the final decision on which clubs would play in the NRL's 2000 season was announced on October 15, 1999), available at <http://www.ntworldhost.com/14teams/timeline.html> (last visited Dec. 10, 1999).

208. Steve Mascord et al., *Deadline Set: News Must Pay to Get its Way*, SMH.COM.AU (noting that NRL Co.'s preferred scenario to reach fourteen clubs for the 2000 season would be three joint ventures), available at <http://www.smh.com.au/league/news/1999907/19/19league2.html> (last visited July 19, 1999).

209. Roy Masters, *Blowin' In the Wind*, THE SYDNEY MORNING HERALD, June 14, 1999, at 21 (noting the admission requirements for a joint venture club).

210. Proposed Merger Agreement, *supra* note 189, at 18 (noting financial incentives for joint ventures before December 1998).

later extended to July 31, 1999.<sup>211</sup>

With respect to the 1999 NRL season, the final merger agreement between News Ltd. and the ARL stated that no less than sixteen, but no more than twenty clubs could play in the league that year.<sup>212</sup> Prior to the start of the 1999 season, two clubs withdrew from the league,<sup>213</sup> and the first merged club in the NRL was created from the St. George and Illawarra clubs.<sup>214</sup> Though the merger agreement promised only a \$4 million (Aud) grant to a merged club, the NRL Partnership upped the ante to \$8 million (Aud) for this initial merger.<sup>215</sup> Thus, seventeen teams played in the 1999 NRL competition.

As the July 31, 1999 deadline for creating joint venture clubs loomed ever closer, individual clubs, especially those in danger of being excluded from the 2000 season, frantically investigated joint venture possibilities.<sup>216</sup> Despite this activity, only one merger occurred before the deadline. On July 28, 1999, the Balmain and Western Suburbs clubs merged after the NRL agreed to provide the new club with \$8 million (Aud) in funding—its previous grant for the St. George/Illawarra joint venture.<sup>217</sup> Despite indications from NRL Co. that the July 31, 1999 deadline was a fixed cut-off for mergers,<sup>218</sup> two clubs—North Sydney and Manly—merged after this date.<sup>219</sup> The impetus for this transaction was North Sydney's failure to meet the basic solvency criteria by October 1, 1999, resulting in NRL Co.'s decision not to extend the club a

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211. Mascord, *supra* note 45 (reporting the merger of Balmain and Western Suburbs on July 28, 1999, three days before the deadline for joint ventures), available at <http://www.smh.com.au/sports/league/news/199907/28/28league1.html>.

212. *South Sydney*, at \*6 (AustLII.edu.au, Austl. Case Law) (noting the agreement between the ARL and News Ltd. for the number of clubs in the NRL for the 1999 season).

213. *Id.* at \*7 (noting the withdrawal of the Gold Coast and Adelaide clubs from the NRL).

214. *Brief History*, *supra* note 207 (noting the NRL's approval of the St. George/Illawarra merger), available at <http://www.ntworldhost.com/14teams/timeline.html>.

215. Steve Mascord, *Show Us the Money, Munk Tells NRL*, SMH.COM.AU (July 12, 1999) (noting that the NRL promised the St. George and Illawarra clubs \$8 million (Aud) in loans and grants "to get their merger going"), available at <http://www.smh.com.au/league/news/199907/12/12league3.html>; Masters Interview, *supra* note 47 (describing the details of the NRL's financial package for joint ventures).

216. Masters, *supra* note 209 (describing the various joint venture discussions among NRL clubs as the joint venture deadline approached).

217. Steve Mascord, *Frykberg Calls for Lifeline on Deadline*, SMH.COM.AU (July 27, 1999) (noting the NRL's approval of \$8 million (Aud) for the merger between the Balmain and Western Suburbs clubs), available at <http://www.smh.com.au/news/league/199907/27/27league.html>.

218. Greg Prichard, *Clubs in Deadline Panic*, SMH.COM.AU (July 18, 1999) (noting that the CEO of NRL Co. stated that the July 31, 1999 deadline was a firm date for mergers), available at <http://www.smh.com.au/news/league/199907/18/18league3.html>.

219. Peter Frilingos, *It's Northern Eagles*, NEWS.COM.AU (reporting that the Northern Eagles is the name for the North Sydney/Manly club), available at <http://www.news.com.au/nws/nrl91112.htm> (last visited Nov. 12, 1999).

license for the 2000 season.<sup>220</sup> To support the North Sydney/Manly merger, News Ltd. loaned the North Sydney club \$2.8 million (Aud) to pay their players, the club's largest creditors, on the condition that the club merge with Manly. NRL Co. also provided the merged club with the now standard \$8 million (Aud) in funding.<sup>221</sup>

By October 15, 1999, the deadline for determining the clubs in the 2000-04 NRL seasons, ten clubs were seeking the nine remaining five year licenses.<sup>222</sup> After applying the selection criteria, NRL Co. announced that Souths ranked last among the ten clubs and failed to qualify for admission into the league.<sup>223</sup> Souths and its supporters were outraged by NRL Co.'s decision,<sup>224</sup> though they knew well before the decision was announced that Souths was likely to be ranked last among the clubs subjected to the selection criteria.<sup>225</sup> In fact, a few days before NRL Co.'s announcement, Souths supporters had organized a march with approximately thirty thousand participants through the streets of downtown Sydney to protest the NRL's reduction process.<sup>226</sup> The elimination of Souths from the NRL sparked the ire of many rugby league fans since the club was a founding member of the first Australian professional rugby league competition in 1907 and was the most successful club in the history of Australian rugby league.<sup>227</sup>

220. Stuart Honeysett, *Rebels Say They Can Clear \$4m Debt*, NEWS.COM.AU (Oct. 6, 1999) (stating that the NRL's decision to kick North Sydney out of the league for insolvency "precipitated the action of Norths agreeing to a joint venture with Manly"), available at <http://www.news.com.au/nws/nrl191112.htm>; *id.* (reporting on a meeting of creditors of the North Sydney club for the purpose of approving an administrator).

221. Paul Kent et al., *Bears Told to Marry for Money*, SMH.COM.AU (Oct. 22, 1999) (reporting the financial support News Ltd. provided for the North Sydney/Manly merger), available at <http://www.smh.com.au/news/league/199910/22/22league1.html>.

222. *Basic Criteria*, *supra* note 206 (listing the ten clubs seeking the nine NRL licenses), available at <http://www.ntworldhost.com/asp/story/asp?id=312>.

223. *NRL Media Release*, NRL.COM.AU (Oct. 15, 1999) (announcing the fourteen clubs receiving licenses for the 2000-04 seasons), available at [http://ntworldhost.com/14teams/media\\_release.html](http://ntworldhost.com/14teams/media_release.html).

224. Philip Cornford, *The Fatal Rabbit Chop That Felled a Proud 92-Year-Old*, SMH.COM.AU (Oct. 16, 1999) (reporting the reaction of Souths' supporters to NRL Co.'s decision), available at <http://www.smh.com.au/news/league/199910/16/16league3.html>.

225. George Piggins, *Surely, This Is a Bad Dream*, SMH.COM.AU (Dec. 13, 1999) (stating that Souths always knew that they were likely to be the club NRL Co. would decide to eliminate from the league), available at <http://www.smh.com.au/news/league/199912/13/13league2.html>. George Piggins is president of Souths.

226. Paul Kent, *Souths Put on The Passion Play*, SMH.COM.AU (Oct. 11, 1999) (reporting on the protest march through Sydney), available at <http://www.smh.com.au/news/league/199910/22/22league1.html>.

227. Cornford, *supra* note 224 (noting that Souths' 20 league championships were the most of any club in rugby league history), available at <http://www.smh.com.au/news/league/199910/16/16league3.html>.

In addition to public protests, Souths initiated legal proceedings challenging NRL Co.'s decision not to grant the club a license to play for the 2000 NRL season.<sup>228</sup> In its suit, Souths claimed that the provision of the merger agreement between the ARL and News Ltd. restricting to fourteen the number of clubs in the NRL was an exclusionary provision as defined in section 4D(1) of the Trade Practices Act, and that enforcement of that provision was per se illegal under section 45 of that same statute.<sup>229</sup> Under Australian competition law:

A provision [in] a contract, arrangement, or understanding . . . [is] an exclusionary provision . . . if[ ] the contract or arrangement was made . . . between persons any [two] or more of whom are competitive with [one another] and [ ] the provision has the purpose of preventing, restricting, or limiting [ ] the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons.<sup>230</sup>

Section 45 of the Trade Practices Act prohibits a corporation from giving "effect to a provision of a contract, arrangement or understanding . . . if that provision . . . is an exclusionary provision."<sup>231</sup>

According to Souths, the purpose of the fourteen club provision in the merger agreement between the ARL and News Ltd.—allegedly two competing rugby league central competition organizers—was to limit the supply of competition organizer services to Souths and Souths' acquisition of competition organizer services from News Ltd. and the ARL. News Ltd.<sup>232</sup> defended on the grounds that the ARL and News Ltd. were not competitive with one another with respect to providing competition organizer services for the 2000 season since they had agreed to produce a single rugby league competition and that the purpose of the fourteen-team provision in the merger agreement was the proper one of producing a rugby league club competition of consistently high standards.<sup>233</sup>

Souths' other significant claim was that NRL Co. improperly applied the selection criteria in breach of the contract that Souths entered into with the

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228. *South Sydney*, at \*8 (AustLII.edu.au, Austl. Case Law) (noting Souths initiation of legal proceedings).

229. *Id.* (discussing Souths' amended statement of claim).

230. Trade Practices Act, 1974, § 4D(1) (Austl.) (defining exclusionary provision).

231. *Id.* § 45(2)(b).

232. Though Souths also named the ARL and NRL Co., along with other NRL clubs, as defendants, News Ltd. presented the primary defense to Souths' claims. *See generally South Sydney*, [1999] F.C.A. 1710 *passim* (AustLII.edu.au, Austl. Case Law).

233. *Id.* at \*10, \*12 (stating News Ltd.'s defense).

ARL and News Ltd. when the club agreed to play in the NRL in 1998 and participate in the rationalization process.<sup>234</sup> In particular, Souths alleged that NRL Co. wrongly included in the profitability category of former Super League clubs the monies these clubs received from News Ltd. when Super League and the ARL merged, and wrongly excluded from Souths' sponsorship category the money paid to the club by South Sydney Junior Rugby League Club Ltd. (Souths Juniors).<sup>235</sup> Absent these categorizations, the Penrith club would have ranked last in the selection criteria and Souths would have received a license to play in the NRL for the 2000-04 seasons.<sup>236</sup>

News Ltd. argued that NRL Co. properly applied the selection criteria. News Ltd.'s expert witnesses testified that under current Australian Accounting Standards the payouts to Super League clubs were properly included in the profit and loss accounts of these clubs.<sup>237</sup> Moreover, Souths had recorded in its accounts the funds from South Juniors as a "grant," akin to a leagues club grant, rather than as sponsorship revenue.<sup>238</sup>

Since a full trial and decision on Souths' claims could not be completed prior to the commencement of the 2000 NRL season, a hearing for interlocutory relief was held in December 1999 with a final hearing scheduled for later in 2000.<sup>239</sup> The relief that Souths sought was a mandatory injunction requiring NRL Co. to include the club in a fifteen-team competition for the 2000 NRL season.<sup>240</sup> Under Australian law, for a court to grant an interlocutory injunction, the complainant must "satisfy the Court that there is a serious question to be tried" and "that the balance of convenience favours the grant of an injunction. . . . In considering the balance of convenience, [the court may appropriately] take into account the apparent strength of the applicant's case."<sup>241</sup>

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234. *Id.* at \*15 (discussing Souths' breach of contract claim).

235. *Id.* at \*16 (discussing the details of Souths' contract claim).

236. *Id.* (noting that NRL Co. would have to rectify both of these alleged mistakes for Souths to receive a license to play in the 2000-04 seasons).

237. *South Sydney*, at \*17 (AustLII.edu.au, Austl. Case Law) (noting the testimony of News Ltd.'s expert accountants).

238. *Id.* at \*18 (noting Souths' recording of funds received from Souths Juniors).

239. *Id.* at \*8 (noting the impracticability of a full hearing on the merits before the start of the 2000 NRL season).

240. *Id.* at \*8-\*9 (discussing Souths' requested relief). Assuming that the court granted an injunction requiring the club's inclusion in the league, Souths also asked the court to order NRL Co. to pay the club the \$2 million (Aud) grant promised to the other 14 clubs for the 2000 NRL season. *Id.* at \*8 (noting Souths' claim for funding from NRL Co.).

241. *Australian Rugby Union Ltd. v. Hospitality Group Pty. Ltd.*, [1999] F.C.A. 1136, at \*6 (Sackville, J.) (Austl. Fed. Ct. Aug. 19, 1999) (AustLII.edu.au, Austl. Case Law) (citations omitted). *See also* *Castlemaine Tooheys Ltd. v. South Australia*, (1986) 161 C.L.R. 148, 1986 WL 590162, at

In evaluating Souths' claims, the court determined that "there is a serious question to be tried as to whether the giving effect to the 14 team term would involve a contravention of [§] 45 of the [Trade Practices] Act."<sup>242</sup> Issues concerning Souths' exclusionary provision claim that the court identified as deserving of further investigation included whether News Ltd. and the ARL were competitive with one another in supplying competition organizing services to rugby league clubs;<sup>243</sup> whether the fourteen-team provision in the merger agreement had the purpose of preventing the supply or acquisition of services to or from a particular class of persons;<sup>244</sup> and whether the fourteen-team provision contravened sections of the Trade Practices Act pertaining to exclusive dealing.<sup>245</sup> As for Souths' breach of contract claim, the court concluded that the club did not have "a seriously arguable case."<sup>246</sup> The evidence presented at the hearing strongly supported NRL Co.'s categorization of News Ltd.'s payouts to Super League clubs and South Juniors grants to Souths.<sup>247</sup>

After reviewing the substance of Souths' claims, the court considered the balance of convenience in granting an interlocutory injunction in favor of the club.<sup>248</sup> The court noted Souths' precarious condition. The club was on the verge of insolvency, which posed a real threat to its ability to pay damages if the club ultimately lost the final hearing on the merits.<sup>249</sup> Because of its dire financial state, Souths had only four players and a head coach under contract at the time of the hearing, though other players had agreed to play for the club if it was admitted into the league.<sup>250</sup> Given that the 2000 NRL season was to start in less than three months from the time of the hearing, the court was uncertain as to whether Souths could assemble a competitive squad in such a short time.<sup>251</sup> Though Souths would lose revenue from being excluded from the NRL during the 2000 season if the exclusion proved to be wrongful, the club could recover any financial losses as part of its relief at the final

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\*5-\*8 (Mason, J.) (Austl. 1986) (discussing principles for interlocutory relief).

242. *South Sydney*, at \*15 (AustLII.edu.au, Austl. Case Law).

243. *Id.* at \*10-\*11.

244. *Id.* at \*13.

245. *Id.* at \*15.

246. *Id.* at \*17, \*19.

247. *South Sydney*, at \*16-\*17 (AustLII.edu.au, Austl. Case Law) (discussing the evidence regarding Souths' breach of contract claim).

248. *Id.* at \*21-\*22 (discussing the balance of convenience for interlocutory relief).

249. *Id.* at \*20 (noting Souths' financial condition may hamper its ability to pay damages to persons harmed by a grant of interlocutory relief).

250. *Id.* (discussing Souths' ability to field a team in the 2000 NRL season).

251. *Id.*

hearing.<sup>252</sup> On the other hand, the Court noted that Souths faced an “appreciable risk” of not being “able to participate successfully in a year 2001 competition” even if it succeeded at a final hearing because of the losses in revenue and fan support the club would likely sustain from not playing in 2000.<sup>253</sup>

With respect to other parties, evidence showed that the other clubs in the NRL would lose revenues if Souths were granted the right to play in the 2000 season.<sup>254</sup> Going from a fourteen-team competition to a fifteen-team schedule would cause each club to play one less home game, resulting in significant monetary loss. Souths’ entry into the league would also likely reduce the sponsorship income of some NRL clubs. Moreover, certain clubs had entered into joint venture arrangements at considerable costs both monetary and non-pecuniary on the basis that NRL Co. would license only fourteen teams for the 2000-04 seasons.<sup>255</sup> Hence the court was “satisfied that there [was] a real risk of substantial financial loss by the 14 clubs . . . if Souths [was] compulsorily admitted as a participant in the year 2000 competition, as opposed to the competition being conducted on the basis proposed by NRL.”<sup>256</sup> In addition to the other clubs, NRL Co. could sustain damages from Souths’ inclusion in the league. Since “[i]t would be impracticable to make an order for Souths participation in the year 2000 without it being entitled to receive the same grants as other clubs,” the court noted that an interlocutory injunction in Souths’ favor would have to include an order requiring NRL Co. to extend \$2 million (Aud) to Souths for the upcoming season.<sup>257</sup> If Souths lost the final hearing on the merits, then NRL Co. would receive no benefit from its grant to the club.<sup>258</sup>

Finally, the court noted that since the approval of the merger proposal in December 1997, the NRL had been steadily marching towards a fourteen-team league for the 2000 season.<sup>259</sup> During this time, other clubs in the league had taken steps to ensure their survival whether by merger or other means.<sup>260</sup> Souths, meanwhile, had rejected joint venture possibilities believing that it

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252. *South Sydney*, at \*21 (AustLII.edu.au, Austl. Case Law).

253. *Id.*

254. *Id.* at \*22 (discussing effect of interlocutory relief on clubs admitted into NRL Co.’s 14-team competition).

255. *Id.* (noting harm to joint venture clubs).

256. *Id.*

257. *South Sydney*, at \*22 (AustLII.edu.au, Austl. Case Law).

258. *Id.* (noting the harm to NRL Co. if Souths were granted inclusion into the 2000 NRL season, but ultimately failed on its claims).

259. *Id.* (noting the agreement to have 14 teams in the NRL by the 2000 season).

260. *Id.* (noting mergers of clubs in the expectation of only 14 teams in the 2000 NRL season).



could meet the admission criteria as a stand-alone club.<sup>261</sup> Though Souths objected to the reduction plan from its inception, the club had participated in the process and only instituted legal proceedings challenging NRL Co.'s actions after being omitted from the league.<sup>262</sup> Given all of the above, the court concluded that "the balance of convenience [was] heavily against the grant of the interlocutory relief sought no matter what sympathy one [felt] for Souths by reason of its exclusion from a competition of which it [was] a foundation member . . ."<sup>263</sup> and denied Souths' request for interlocutory relief.

Despite the league's victory in the interlocutory hearing against Souths, controversy over the NRL's reduction process continues. Souths is pursuing its case in a full hearing on the merits.<sup>264</sup> As a result of the reduction in the number of clubs in the league, especially the decision to eliminate Souths from the NRL, many supporters of rugby league are expected to switch their allegiances to other sports.<sup>265</sup> The extent of consumer backlash against the NRL for its reduction decisions is presently unknown.

The fight between Souths and the NRL over the club's inclusion in the 2000 NRL season is all the more remarkable in light of the strong precedent in Australia supporting the authority of a central competition organizer to select clubs for membership in the league. *Wayde v. New South Wales Rugby League Ltd.*<sup>266</sup> involved a legal challenge by the Western Suburbs Football Club (Western Suburbs) to the decision of the board of directors of the New South Wales Rugby Football League Ltd. (NSWRL) to deny the club future entry into the league.<sup>267</sup> Western Suburbs' primary claim was based on then section 320(2) of the Companies (NSW) Code.<sup>268</sup> Section 320(2) provided:

If the Court is of the opinion

that the affairs of a company are being conducted in a manner that is

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261. *Id.* (noting Souths' hope to remain in the NRL as a stand alone club).

262. *South Sydney*, at \*22 (AustLII.edu.au, Austl. Case Law) (noting Souths' activity during the NRL rationalization process).

263. *Id.* at \*22.

264. Greg Prichard, *Traitors Who Sold Out Souths*, SMH.COM.AU (Dec. 13, 1999) (reporting that Souths is considering whether to pursue its case on the merits), available at <http://www.smh.com.au/league/news/199912/13/13league1.html>.

265. Malcolm Knox, *They Are Gone But We, The Spectators, Will Be Back ...*, SMH.COM.AU (Dec. 10, 1999) (noting that many supporters of rugby league vowed not to watch a rugby league match or to follow a club in a different sport, such as rugby union, after Souths lost their case for inclusion in the 2000 NRL season), available at <http://www.smh.com.au/league/news/199912/10/10league6.html>.

266. (1985) 180 C.L.R. 459, 1985 WL 514185 (Austl. Oct. 17, 1985).

267. *Id.* at \*5.

268. *Id.* at \*7.

oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member . . . or in a manner that is contrary to the interests of the members as a whole [ ]

...

the Court may . . . make such . . . orders as it thinks fit . . .<sup>269</sup>

Western Suburbs argued that since the club was competitive on the playing field and its inclusion in the league did not make staging the competition between the clubs infeasible, the board of directors' decision to deny it admission to the league was unfairly prejudicial.<sup>270</sup>

The High Court of Australia disagreed. The Court noted that the NSWRL had incorporated for the very purpose of creating a board of directors that would promote the best interests of the league as a whole.<sup>271</sup> The NSWRL's articles of incorporation expressly gave the board of directors the power to determine the clubs that would be permitted to play in the league.<sup>272</sup> Western Suburbs agreed to the incorporation of the league and at the time of incorporation admitted that "it had no secure right to participate in the . . . competition."<sup>273</sup> Since the board of directors made its decision "honestly in pursuit of the object of fostering the game of rugby league and serving its best interests,"<sup>274</sup> the elimination of Western Suburbs from the league was not oppressive or unfairly prejudicial in the statutory sense, despite the considerable harm to the club from its exclusion.<sup>275</sup>

Despite the clear holding of *Wayde*, the NRL could not implement its reduction plans without fear of legal challenge from a disenfranchised club. Though Souths did not allege an oppressive conduct claim under Australian corporate law, the club's breach of contract claim was not dissimilar to Western Suburbs' claim in *Wayde*. In both *South Sydney* and *Wayde*, the excluded club challenged the central competition organizer's application of the admission criteria to the club's particular situation. In *Wayde*, Western Suburbs claimed that the prejudice to the club so outweighed the perceived benefits to the NSWRL that the league's decision was oppressive.<sup>276</sup> In *South*

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269. *Id.* (quoting § 320 of the Companies Code (N.S.W. ACTS)).

270. *Id.* at \*8 (discussing Western Suburbs' claim).

271. *Wayde*, 1985 WL 514185, at \*8 (discussing the incorporation of the New South Wales Rugby League).

272. *Id.* (noting the powers of the board of directors).

273. *Id.*

274. *Id.*

275. *Id.* (concluding that the board of directors' decision was not illegal).

276. *Wayde*, 1985 WL 514185, at \*8.

*Sydney*, Souths flatly alleged that NRL Co. incorrectly applied the selection criteria to the clubs seeking licenses.<sup>277</sup> Though the courts in these cases gave little weight to the excluded clubs' claims, the central competition organizers were forced to expend substantial sums to defend their decisions.

Similarly, neither *Wayde* nor *South Sydney* precludes future conflicts over club reduction issues since a club dispelled from the league can almost always make a fact specific challenge to the application of the admission criteria. In addition, the particular circumstances surrounding a league's reduction decision is likely to give rise to specific legal claims. For example, Souths could allege a Trade Practices Act claim because the NRL's reduction plan was the product of a merger agreement between two rival competition organizers, allegedly horizontal competitors for the supply of competition organizer services. Rather than insulating a central competition organizer from lawsuits contesting its decisions, *Wayde* and *South Sydney* teach the need for a central competition organizer to be able to justify its actions that may negatively affect individual clubs.

#### IV. COLLECTIVE ACTION PROBLEMS IN AMERICAN AND AUSTRALIAN TRADITIONAL PROFESSIONAL SPORTS LEAGUES REDUCE THE QUALITY OF THE LEAGUES' PRODUCTS TO THE DETRIMENT OF PURCHASERS

The quality of a traditional league's products depends upon the extent to which the members of the league work together for the benefit of the enterprise.<sup>278</sup> Where league participants fail to cooperate adequately, the reduction in quality of a traditional league's products harms not only the league by reducing its revenues,<sup>279</sup> but also the purchasers of the league's products. Fans suffer from higher prices for less entertaining games.<sup>280</sup> Municipalities lose resources from franchise free agency.<sup>281</sup> Incompetent league administration threatens a mega-media company's return on its purchase of a league's television rights.<sup>282</sup>

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277. *South Sydney*, at \*8 (AustLII.edu.au, Austl. Case Law).

278. Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 34 (1991) (noting that the cooperation among clubs in a traditional professional sports league is a "form of quality control").

279. Mason & Slack, *supra* note 55, at 419 n.85 (noting that attendance in MLB dropped 20% in 1995 after the industrial dispute of 1994).

280. Ross, *supra* note 9, at 702 (noting that "fans are the primary victims of inefficient management" of traditional professional sports leagues).

281. Leone, *supra* note 123, at 487 (noting the conclusions of economic reports on franchise free agency).

282. Remarks of David Hill, Chairman and CEO, Fox Sports Television Group, at ANZSLA Conference (Sydney, Australia Aug. 5, 1999) [hereinafter Hill remarks] (noting that incompetence of

The most direct effect on a mega-media company from a traditional league's mismanagement is that consumers will lose interest in the league and consequently in the mega-media company's telecasts of the league's games. The value of an established league's transmission rights to a mega-media company is directly proportional to the attractiveness of the league's contests to viewers.<sup>283</sup> This relationship between the value of a league's transmission rights and viewer interest is particularly significant to traditional network broadcasters, whose revenues depend on the size and composition of the television audiences they sell to advertisers.<sup>284</sup> If ratings for the telecasts of a traditional league are appreciably lower than anticipated, a network broadcaster may have to reimburse advertisers with commercial time on other shows.<sup>285</sup>

A traditional league's mismanagement of its affairs may affect a mega-media purchaser in ways other than through a drop in ratings. At the extreme is a mega-media company's involuntary loss of the league's product for an extended period. Usually, this situation occurs when a traditional league is involved in a labor dispute with its players. If the traditional league suffers a work stoppage, then the mega-media company that has purchased the rights to transmit the league's games loses its programming for the duration of the labor unrest. Even if a mega-media company contracts only to pay the established league for games actually transmitted, a mega-company is likely to be harmed by the cancellation of games. Since mega-media companies generally plan their programming schedules weeks in advance, the loss of a league's telecast forces a mega-media company to scramble for alternative programming. In addition, if a mega-media company depends on the sports programming to attract viewers to its other shows, then loss of a traditional league's telecasts may harm a mega-media company's overall ratings.

For example, prior to the start of the 1998-99 NBA season, the NBA owners locked out the players while the parties negotiated a new collective bargaining agreement. The National Broadcasting Company (NBC), a commercial broadcast television network owned by General Electric Inc., and

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league administrators is a great threat to a mega-media company's investment in purchasing transmission rights) (notes on file with author).

283. Michael Hiestand, *CBS Locks in College Hoops for \$545M*, USA TODAY, Nov. 19, 1999, at 1C.

284. *Id.* (noting that broadcast networks pay large sums for the television rights to premium sports events because of the large audiences for these shows).

285. Associated Press, *NBC Taking Ratings Hit in Finals*, ESPN.COM (June 20, 1999) (reporting that FOX Sports was forced to provide advertisers with extra commercial spots on other shows because of the low ratings for the 1998 World Series), at <http://espn.go.com/nba/playoff/features/1999/990620/01316250.html>.

Turner Sports, a cable programmer and a subsidiary of Time Warner Inc., had each purchased multi-year television rights for NBA games including the 1998-99 season.<sup>286</sup> Under the terms of their contracts with the NBA, NBC and Turner Sports were committed to paying "their entire \$550 million [(U.S.)] rights fees regardless of how many games [were] played."<sup>287</sup> Turner Sports' agreement with the NBA, however, provided that Turner would be repaid for the cancellation of any games it had scheduled to televise during the lockout with extra games in the final years of its contract with the league.<sup>288</sup> In addition, FOX Sports Net, part of News Corporation, had purchased local television rights to twenty-six of the twenty-nine teams in the NBA.<sup>289</sup> Most of FOX Sports Net's contracts with the individual clubs required the company only to pay for games that were played.<sup>290</sup>

Though it did not—unlike NBC and Turner Sports—have to pay rights fees for cancelled games, FOX Sports Net was more adversely affected by the NBA lockout than were the other two television channels.<sup>291</sup> This was so because local NBA games were FOX Sports Net's highest-rated shows during the winter months, while NBC and Turner Sports were not as heavily dependent on NBA programming.<sup>292</sup> The loss of NBA telecasts also threatened to lower the ratings for FOX Sports Net's flagship sports news program, Fox Sports News, because it depended on NBA games to provide a strong "lead-in" to attract viewers.<sup>293</sup> Regardless of the particular way each was affected, NBC, Turner Sports, and FOX Sports Net all suffered from the NBA lockout and were forced to find alternative programming to replace the cancelled NBA games.<sup>294</sup>

Since most contracts for the sale of a traditional league's transmission

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286. Churchill, *supra* note 130 (reporting the details of NBC's and Turner Sports' contracts with the NBA).

287. Josh Dubow, *Fox Sports Net Takes Hit*, AUSTIN AM.-STATESMAN Oct. 30, 1998, at C4, available at 1999 WL 3629971.

288. *Id.* (discussing the effect of the NBA lockout on the mega-media companies that had purchased rights to televise NBA games).

289. *Id.* (noting FOX Sports Net's contracts with individual NBA clubs).

290. *Id.*

291. *Id.* (noting that FOX Sports Net would be more affected by the NBA lockout than NBC or Turner Sports would be).

292. *Id.* (discussing different effects of the NBA lockout on FOX Sports Net, NBC, and Turner Sports).

293. *Id.* (discussing affect of the NBA lockout on ratings for FOX Sports Net's flagship news show).

294. *Page Three*, USA TODAY, Dec. 31, 1998, at 3C (reporting that cable networks lost viewers and advertising revenues from the cancellation of NBA games during the lockout and were forced to find alternative programming).

rights are multi-year agreements, upon purchase of such rights a mega-media company has a long-term stake in the proper administration of the league. Though a mega-media company can protect itself by contract against some risks from league affairs or policies that threaten consumer interest in the company's telecasts, unforeseen circumstances that dampen viewer enthusiasm can arise in a league for which a mega-media company has no short-term recourse. Because of the risk that traditional leagues will not operate their affairs so as not to alienate viewers, mega-media companies are increasingly taking steps to protect their investments in league products. Mega-media companies and established leagues now talk of entering into "partnerships" when they contract for the purchase of a league's transmission rights.<sup>295</sup>

The current relationship between NBC and the NBA is illustrative of the new "partnership" arrangements that are becoming more prevalent in the media/sports industry. Dick Ebersol, chairman of NBC Sports, which outbid CBS for the television broadcast rights to NBA games in 1989, and David Stern, commissioner of the NBA, have a "very close personal friendship" and speak to one another approximately three hundred days a year.<sup>296</sup> This arrangement reflects Ebersol's belief "in building partnerships with the teams, leagues and properties that NBC telecasts, creating sports programming that is closer to entertainment than to hard news."<sup>297</sup> Stern, "who sees television as the primary window on his sport," is also very much involved in the television production of NBA games.<sup>298</sup> Among other things, Stern negotiates minimum production standards in the NBA's contracts with mega-media companies and participates in the weekly meetings with NBC and Turner Sports about the past and upcoming telecasts of NBA games.<sup>299</sup>

Though forging "partnerships" is now in vogue, recent events in the sports programming world show that the ties between a particular mega-media company and professional sports league are not permanent and that a league's profits—not loyalty—often dictate the identity of its mega-media company partner. A long-term relationship with a traditional professional sports league does not guarantee a mega-media company the league's transmission rights in the future. This principle is best demonstrated by the experience of CBS with respect to obtaining rights to televise NFL games. In 1961, CBS was the first

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295. Hill remarks, *supra* note 282 (noting that FOX Sports seeks to "partner" with an established professional sports league to present the sport on television).

296. Schoenfeld, *supra* note 174, at 97.

297. *Id.*

298. *Id.* at 97-98.

299. *Id.* at 98.

American network to purchase the NFL's national television rights and continually televised NFL games for the next thirty-two years.<sup>300</sup> In 1993, however, the NFL terminated its relationship with CBS, primarily because the FOX network, a subsidiary of News Corporation, outbid CBS for the league's television rights.<sup>301</sup> In 1998, CBS regained television rights to NFL games by outbidding NBC, a network with a long history of televising NFL games.<sup>302</sup> Similarly, in November 1999, NASCAR, the American stock car racing series and an increasingly valuable programming property, decided to award its television rights to an alliance between NBC and Turner Broadcasting Station (TBS) (a subsidiary of Time Warner, Inc.) and FOX Sports.<sup>303</sup> CBS, despite providing the first live coverage of a NASCAR event and televising NASCAR's premier event, the Daytona 500, every year since 1979, was not granted television rights to any NASCAR races.<sup>304</sup>

Mega-media companies, therefore, face many challenges in purchasing transmission rights from established professional sports leagues. The price for these rights continues to rise.<sup>305</sup> Disruptions in league operations beyond a mega-media company's control threaten to decrease the quality of a traditional league's transmission rights, and consequently, a mega-media company's return on its investment in these rights. Finally, a mega-media company is not guaranteed the transmission rights of an established professional sports league, even after establishing a long-term relationship with a particular league.

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300. Ira Horowitz, *Sports Broadcasting*, in GOVERNMENT AND THE SPORTS BUSINESS, *supra* note 28, at 275, 283 (noting the first pooled rights contract between CBS and the NFL in 1961).

301. David Hill, *The Impact of Technology and the Globalisation of Sport*, *FOX Sports History* (paper presented at ANZSLA Conference Sydney, Australia, Aug. 1999) (noting FOX Sports' agreement with the NFL in 1993 to televise NFL games) (on file with author).

302. Michael Hiestand, *Fox, NBC New Drivers in NASCAR*, USATODAY.COM (noting that NBC lost the rights to televise NFL games), *available at* <http://www.usatoday.com/sports/motor/nascar/smna010.htm> (last visited Nov. 12, 1999).

303. *Id.* (noting that NASCAR awarded its television rights to FOX and NBC, two mega-media companies that had never before televised NASCAR races).

304. *Id.* (noting CBS's history of televising NASCAR events since 1979).

305. Hiestand, *supra* note 283 (noting that escalation in the price for the transmission rights to popular sporting events is not likely to abate in the near future).

## CHAPTER THREE

MEDIA LEAGUES: AN ALTERNATIVE TO PURCHASING PRODUCTS FROM  
TRADITIONAL LEAGUES

## I. EXPLANATION OF THE MEDIA LEAGUE CONCEPT

A media league is the “in-house” production by a mega-media company of a competition among professional sports teams. A media league represents a mega-media company’s vertical integration of content origination of professional sports league programming into the other stages of “broadcasting” production (e.g., content and service packaging, service provision, infrastructure provision, and terminal vending).<sup>306</sup> By creating a media league, a mega-media company becomes a producer, rather than a purchaser, of the products of a professional sports league.

In a media league, a mega-media company controls every aspect of the professional sports league. The mega-media company performs all the functions of a central competition organizer, league office, and the individual clubs in a traditional league and owns all the products that a professional sports league produces, including the intellectual property and transmission rights for the league and clubs. Though variations in organizational details are possible, the following is an example of a “parent/subsidiary” media league.

In a “parent/subsidiary” media league, each individual “club” is a subsidiary of the parent mega-media company. Each “club subsidiary” fields a team that competes in the league. Another subsidiary of the parent mega-media company acts as the “central competition organizer” that administers and coordinates the league competition. Ultimate authority over all league policies and affairs, however, rests in the parent mega-media company.

Though not a novel idea,<sup>307</sup> single firm, and particularly corporate, ownership of a major professional sports league is rare.<sup>308</sup> The lack of

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306. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REGULATION AND COMPETITION ISSUES IN BROADCASTING IN THE LIGHT OF CONVERGENCE, DAFE/CLP (99)1, at 33-34 [hereinafter OECD PAPER ON CONVERGENCE] (identifying and defining five stages of production in broadcasting).

307. Hovenkamp, *supra* note 76, at 12 (“One might conceive of a different world in which a single firm owned and managed all the teams. In that case, coordination of football would be nothing more than a parent corporation’s operation of its subsidiaries, and no joint venture would be necessary.”).

308. In both the United States and Australia, single firms, including individuals, own minor professional sports leagues. Greg Boeck, *Thomas Takes Major Steps: Ex-NBA Star Makes Big Impact with CBA*, USA TODAY, Jan. 21, 2000, at 14C (noting Isiah Thomas’ purchase of the



corporate ownership of professional sports leagues in the United States and Australia is somewhat surprising given that there "is no inherent barrier"<sup>309</sup> or "legal impediment"<sup>310</sup> to a league structure whereby a single corporation operates the league and controls the teams. The reason typically given for the absence of single firm ownership of a professional sports league is that the common ownership of all the teams in the league creates the "appearance that there is no real competitive rivalry among franchises."<sup>311</sup> It is argued that corporate ownership of all the teams in the league may lead consumers to believe that the competition between teams is not honest and the outcomes of the contests are predetermined to serve the owner's financial well being.<sup>312</sup>

To be sure, honest authentic rivalry among participating teams is critical to the success of a professional sports league. For this reason, traditional leagues in the United States and Australia carefully guard against any perception that their contests are "rigged" or in any way influenced by outside sources, especially those connected to gambling and organized crime.<sup>313</sup> An association of independently owned or operated clubs, however, is not the only structural format that can produce legitimate matches between teams comprised of professional athletes. The structure of American and Australian established leagues is as much a product of historical accident as it is of a conscious decision on the part of league founders to create and preserve an authentic competition among professional sports teams.<sup>314</sup> Nothing in that history precludes the creation and operation of a legitimate sports competition by a single mega-media company.

Just like it creates and encourages rivalry among its divisions, subsidiaries, or employees as a means of obtaining more efficient production,<sup>315</sup> a mega-

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Continental Basketball League (CBA), a minor professional basketball league in the United States); Michael Cowley, *Baseball: Storm Shortstop Has Buckley's of Forgetting Inning from Hell*, SMH.COM.AU (Feb. 15, 1999) (noting David Nilsson's purchase of the professional baseball league in Australia), available at <http://www.smh.com.au/news/9902/15/sprot/sport27.html>.

309. Roberts, *supra* note 30, at 237 n.56.

310. *Id.* at 263 n.155.

311. Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports League Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729, 782 n.224 (1987).

312. Roberts, *supra* note 30, at 263 ("Because the attractiveness of the entertainment product depends to a large extent on the appearance of, and fan identification with, honest interleague rivalry, sports leagues always have structured themselves to foster it.").

313. *DeBartolo Fined \$1 Million*, ESPN.COM (Mar. 15, 1999) (noting the \$1 million fine the NFL levied against Eddie DeBartolo, former owner of the San Francisco 49ers, for his association with organized gambling figures), at <http://espn.go.com/nfl/news/1999/990315/01163331.html>.

314. See *supra* notes 11-54 and accompanying text (discussing the development of American and Australian established professional sports leagues).

315. Roberts, *supra* note 30, at 264. Roberts stated that:

media company through proper planning can promote real, heated rivalry between the club subsidiaries in a media league. To accomplish this, a media league should have at least eight clubs, the number generally recognized as the minimum for a professional sports league to succeed.<sup>316</sup> A mega-media company can maximize attendance at games and viewing audience by locating its clubs in major metropolitan markets since attendance at sporting events is directly proportional to population<sup>317</sup> and the large population centers in the United States and Australia have a relatively large percentage of the television households in these two countries.<sup>318</sup> Knowing the importance of creating an honest and transparent competition between the clubs, the mega-media company parent should not manipulate the outcome of games nor the performance of players in an effort to increase ratings or audiences.<sup>319</sup> Though a mega-media company may promote the geographic rivalries between its clubs and highlight the star players in the league, it should not interfere with the internal operation of an individual club, such as dictating a club's use of players in a game.<sup>320</sup> Each "club subsidiary" should have total control over its team with respect to "on-the-field" issues.

In addition to guarding club autonomy, the mega-media company parent must treat each club impartially to preserve the integrity of its media league. For example, a mega-media company must implement a player allocation

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Partnerships and large corporations frequently create and encourage rivalry among their partners, divisions, subsidiaries, or employees as a means of encouraging more efficient and productive activity. . . . Ideally, this internal rivalry creates for the partner, division, subsidiary, or employee interest and incentive to maximize the firm's interests. Such rivalry benefits not only the firm, whose profits will be increased, but also the consumer who should see an increase in overall economic efficiency resulting in lower prices or in more and higher quality products.

*Id.*

316. Ross, *supra* note 9, at 660-61 (noting that eight teams is likely the minimum number of clubs for a professional sports league to succeed).

317. Roger G. Noll, *Attendance and Price Setting*, in GOVERNMENT AND THE SPORTS BUSINESS, *supra* note 28, at 115, 154 ("[T]here is a tendency for a team of any given quality to have greater attendance if it is located in a big city."); DEMMERT, *supra* note 66, at 68 ("Population has a positive effect on the demand for tickets, the more populous a market, the greater the demand for tickets.").

318. Rosenbaum, *supra* note 311, at 819-20 ("[T]he largest population centers comprise the greatest share of the television viewing population."). See generally Rosenthal, *supra* note 81, at 429 (noting that "big city teams supply the fan base that makes valuable television contracts possible").

319. Robert Wagman, *Baicher—Jair Trade Raises Ethical Questions About MLS Ownership*, SOCCERTIMES.COM (Aug. 17, 1999) (noting that the trade of players between two MLS clubs owned by the same person which appeared to favor the team with a better chance of making the playoffs raised concerns about the integrity of the league), available at <http://soccertimes.com/wagman/1999/aug17.htm>.

320. Alan Deutschman, *Sly as Fox*, N.Y. TIMES, Oct. 18, 1998 (Magazine), at 68, 70 (reporting that News Corporation's FOX network may have tried to coerce the Chicago Cubs into playing a star player in order to improve ratings for one of its broadcasts during the 1998 MLB season).

scheme that distributes playing talent equally among the clubs. Despite evidence that overall game attendance and revenues are increased by larger market teams having a slightly higher winning percentage and more star players than smaller market teams,<sup>321</sup> a mega-media company must resist the temptation to skew the playing quality of its teams in favor of the larger market clubs. Though favoring larger market clubs may maximize media league revenues in the short-term, continual implementation of such a policy is likely to erode consumer confidence in the league, damaging the long-term prospects for a media league's success.<sup>322</sup>

A mega-media company can choose from a number of different arrangements to promote competitive balance in a media league. For example, the parent company may grant each club subsidiary an equal amount of funds with a fixed amount designated for signing players and another fixed sum to operate the team. This scheme requires either the parent company or the subsidiary central competition organizer to enforce a salary cap. With a salary cap, a mega-media company is forced to expend sums to monitor and enforce clubs' adherence to the cap. Alternatively, the parent company may allot each club subsidiary a lump sum allowing each team to decide how much to spend on players, coaches, and other expenses. Either option would substantially eliminate any rich club-poor club disparity and produce a rivalry between the club subsidiaries on the field and in the front office.

Another possible competitive balance arrangement would be for the parent company to sign the players and then use a draft system to distribute the players to the clubs. The mega-media company could create a tiered salary structure based on players' skills and sign a certain number of players in each salary category. Then each club would select a fixed "amount" of players.<sup>323</sup> A significant difference between this option and the schemes discussed

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321. Zimmerman & Cox, *supra* note 74, at 2 n.4 (noting that league revenues are maximized by large market teams having slightly higher winning percentages than smaller market teams); Noll, *supra* note 317, at 154 (concluding that star players draw more fans in a large city than a small city); James Quirk, *An Economic Analysis of Team Movements in Professional Sports*, 38 LAW & CONTEMP. PROBS. 42, 44 & n.4 (1973) (noting that though big city franchises have greater revenue potential than small city franchises and that star players are thus valued more highly by the former, there is an economic limit on the number of star players any franchise should sign).

322. *Better Late Than Never*, SPORTS ILLUSTRATED, June 19, 1995, at 28 (noting that fans of small market MLS teams are worried that the league, which has extensive control over player allocation, will move their better players to large market clubs where they have a greater value to the league), available at 1995 WL 12559364. See generally Hill remarks, *supra* note 282 (emphasizing that "the consumer is keen" and that a firm involved with a professional sports league that ignores this fact does so at its peril); *supra* notes 80-115 and accompanying text (discussing competitive imbalance problem in MLB).

323. PETER FITZSIMONS, THE RUGBY WAR 67 (1996) (describing the World Rugby Union Corporation's proposed graduated salary scale).

previously is that the parent company, instead of the individual clubs, decides how much to spend on a particular player. An advantage of clubs making the player hiring decisions is that this arrangement gives the clubs greater autonomy, which may provide consumers more assurance of club independence. An advantage of the sign/draft proposal is that it eliminates the need for a salary cap. Under either proposal, the mega-media company ultimately controls the cost of hiring players.

To provide a further incentive for spirited competition between the clubs, a mega-media company could allow the club subsidiary hosting a game to retain a percentage of the gate revenues to encourage the club to build a winning team.<sup>324</sup> This approach would be particularly appropriate if each club subsidiary is solely responsible for promoting the team in its geographic area.<sup>325</sup> In addition, the employees of a club subsidiary could be paid bonuses based on the club's level of success.<sup>326</sup>

Thus by structuring its media league appropriately, a mega-media company can ensure legitimate, honest contests between evenly matched teams.

## II. FACTORS FAVORING MEDIA LEAGUE FORMATION

Several indicators point toward the future formation of media leagues. These are (1) the relationship between mega-media companies and professional sports leagues and the effect of the integration of the media and telecommunications markets on this relationship; (2) globalization of the entertainment economy in general, and professional sports leagues in particular; (3) a single firm's treatment under the American and Australian antitrust laws; (4) a mega-media company's ability to innovate in response to changing consumer preferences; and (5) the ready availability of players in the United States and Australia.

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324. DEMMERT, *supra* note 66, at 89. Demmert states that:

The integrity of athletic competition, and thus the primary attraction of sport, is insured when players are clearly and explicitly motivated to win by direct and visible economic incentives. The interest of the fan is directly related to the stakes of the game, and if these stakes are diminished the sport loses part of its appeal.

*Id.*

325. Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, The Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943, 986 n.157 (1988) (noting that each American established professional sports league allows each club to retain a majority of the home gate receipts as an incentive for the clubs to market vigorously and to field a winning team).

326. Hank Hersch, *Now the Hard Part*, SPORTS ILLUSTRATED, Oct. 31, 1994, at 6 (noting MLS's incentive system of paying bonuses to winning teams), available at 1994 WL 13594123.

A. *The Relationship Between Professional Sports Leagues and Mega-Media Companies and the Effect of the Integration of the Media and Telecommunications Markets*

1. Importance of mega-media companies to professional sports leagues

Establishing a relationship with at least one mega-media company is economically essential for traditional American and Australian leagues.<sup>327</sup> Traditional leagues rely on mega-media companies for a substantial portion, if not a majority, of their revenues and for promotion of their contests on national and local levels.<sup>328</sup> A traditional league's failure to garner the support of a mega-media company is likely to limit severely its financial returns and threaten its long-term survival.<sup>329</sup>

2. Importance of professional sports leagues to mega-media companies

Though not necessarily critical to their survival, professional sports leagues are important to mega-media companies.<sup>330</sup> Sports leagues provide mega-media companies with valuable programming content. Telecasts of professional sports events have the potential to attract a large viewing audience with a relatively high percentage of young male viewers.<sup>331</sup> This feature of a professional sports league is especially valuable to free-to-air broadcasters, since many advertisers covet the attention of a young male audience. Broadcasters routinely charge some of their highest fees for advertising time during the telecasts of the most popular games of an

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327. *United States Football League v. National Football League*, 842 F.2d 1335, 1353 (2d Cir. 1988) (noting that a television contract is the most vital requirement for a professional sports league); BERRY & WONG, *supra* note 17, at 61 ("Television has been called the salvation of modern professional sports."); Rosenbaum, *supra* note 311, at 803 ("[A] television contract [is] perhaps the most critical measure of success in the highly competitive sports industry.").

328. The league obtains advertising from the mega-media company's promotion of its telecasts of the league's contests during its other programming hours. This benefit is similar to the one the league receives from news coverage of its competition. Neale, *supra* note 8, at 3-4 (discussing the effect of news coverage on a league's revenues).

329. Rosenbaum, *supra* note 311, at 803 ("Without this essential commitment of network broadcasting time, the USFL was destined to fail.").

330. WOLF, *supra* note 3, at 244 ("No premier network has ever survived without marquee sports as a vehicle to attract male viewers.").

331. Harvey Araton, *Bizball*, N.Y. TIMES, Oct. 18, 1998 (Magazine), at 59, 60 (noting the ability of professional sports programming to "pull strong demographic groups"); FITZSIMONS, *supra* note 323, at 2 (noting that at the time News Ltd. started Super League, telecasts of top grade rugby league were the most popular television shows among the 18-35 year-old male population in New South Wales and Queensland).

established league.<sup>332</sup>

The recent experiences of CBS, one of the four major free-to-air networks in the United States, with respect to its telecasts of NFL games demonstrate the extent to which network broadcasters treasure the transmission rights to major professional sports leagues. In 1993, News Corporation, which wanted NFL transmission rights to boost the credibility of its fledgling FOX broadcast network, outbid CBS for the rights to televise NFL games.<sup>333</sup> From 1994-97, the years the network was without NFL programming, the ratings for CBS's shows dropped considerably.<sup>334</sup> In an attempt to break its ratings slump, in 1998 CBS paid \$4 billion (U.S.) over eight years for the non-exclusive rights to televise NFL games.<sup>335</sup> Not coincidentally, shortly after regaining transmission rights to NFL games, CBS's ratings climbed dramatically, its viewership among young males increased substantially, and the network had the highest ratings of any free-to-air broadcaster in the United States for the 1998-99 television season.<sup>336</sup>

Sports programming is also a major driver of subscriptions for a mega-media company's fee-based services, such as cable or satellite television. Rupert Murdoch's statement that News Corporation "intend[s] to use sport[s] as a battering ram in all [its] pay-television operations" makes clear that "sport is being used to drive the growth of pay television."<sup>337</sup> News Corporation is following this strategy in establishing its English and Australian pay-television services by acquiring the transmission rights to the English Premier Football League and the top grade Australian professional rugby league competition.<sup>338</sup>

332. Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 MARQ. SPORTS L.J. 65, 65 (1995) ("[B]roadcasting companies use professional sports as their most important medium to sell commercial time.").

333. Araton, *supra* note 331, at 60.

334. *Id.* at 61 (noting that CBS was a "slumping network" before it regained transmission rights to NFL games in 1998).

335. *Id.* (noting that in making its deal with the NFL, "some media analysts said [CBS] was banking its very future on football's power to draw male viewers back to the slumping network").

336. *Id.* (noting that CBS won the "ratings race" for the first two weeks of the NFL season in 1998, the first time the network had "led any week since . . . 1993"); Mark Scheerer, *Guy TV: Networks Vying for Remote Control*, CNN.COM (noting that CBS had "a jump in male viewership ever since it paid an unprecedented \$4 billion for the rights to televise NFL games"), available at <http://www.cnn.com/SHOWBIZ/TV/9811/17/guy.tv.html> (last visited May 27, 1999).

337. OECD PAPER ON CONVERGENCE, *supra* note 306, at 33 n.4.

338. *Id.* (noting that News Corporation's acquisition of "the rights to Premier League football turned BSkyB from a deadweight that nearly sank the Murdoch empire into the world's most profitable satellite-television operator, and the dominant power in the pay-television business in Britain").

Finally, sports provide mega-media companies with a large number of hours of programming that contrasts sharply with their regular fare of scripted taped programming.<sup>339</sup> The recent transmission rights agreement between MLB and Disney demonstrates the quantity of content a professional sports league can provide a mega-media company that has multiple platforms from which to transmit programming. "Each year from 2000 through 2005, ESPN and ESPN2 [two of Disney's cable channels] will present more than 800 hours of regular-season game and studio coverage, up from approximately 500 hours on both networks in 1999."<sup>340</sup> The agreement also increases the amount of MLB content on Disney's ESPN Radio, ESPN Classic, and ESPN.com media outlets.<sup>341</sup>

Because of the value of professional sports league programming, many mega-media companies are willing to risk certain financial loss for the transmission rights of an established league on the expectation that any loss suffered will be offset by other benefits of sports content. For example, though News Corporation lost \$350 million (U.S.) on its \$1.58 billion (U.S.) purchase of free-to-air rights to NFL games in 1993, the value of its FOX network increased by approximately \$4 billion (U.S.) over its four-year NFL deal.<sup>342</sup> Even if one mega-media company decides that the loss from purchasing the transmission rights of an established league is too great, another mega-media company is often willing to take the risk of acquiring the league's product. For example, in 1998 Disney agreed to pay \$600 million (U.S.) over five years for the National Hockey League's (NHL) exclusive transmission rights, even though News Corporation had lost \$155 million (U.S.) over the preceding five years on its \$150 million (U.S.) purchase of the NHL's free-to-air television rights.<sup>343</sup>

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339. Rudy Martzke, *Sports in the 20<sup>th</sup> Century: TV Brought Games Into Homes*, USATODAY.COM (Feb. 15, 1999) ("In the beginning, the TV stations had the time, and sports was there to fill the hours." (quoting Jim McKay, noted American sports journalist and commentator)), available at <http://www.usatoday.com/sports/stues2.htm>; STEVE GREENFIELD & GUY OSBORN, CONTRACT AND CONTROL IN THE ENTERTAINMENT INDUSTRY 171 n.8 (1998) (noting that professional sports provide "multi-channel broadcasters with a cornucopia of content to fill many programming hours").

340. *ESPN, ESPN2 To Present More Than 800 Hours of Coverage*, ESPN.COM (Dec. 6, 1999) (reporting the details of the agreement between MLB and ESPN), at <http://espn.go.com/espninc/pressreleases/991206mlb.html>.

341. *ESPN Boosts Annual MLB Coverage*, ESPN.COM (Dec. 6, 1999), at <http://espn.go.com/mlb/news/1999/1206/216862.html>.

342. Araton, *supra* note 331, at 60-61 (noting the benefits of NFL programming to News Corporation).

343. Deutschman, *supra* note 320, at 71 (noting that Disney bought the NHL's rights out of desperation to reach young male viewers); Araton, *supra* note 331, at 61 (reporting the details of Disney's and News Corporation's NHL deals).

### 3. Convergence of the media and telecommunications markets

The media and telecommunications markets in the United States and Australia are converging. Convergence is generally defined

as the process under which, due to underlying technological changes, economies of scope increase to the point where two or more products or services which were previously produced by separate firms are produced within the same firm.... In other words, at root convergence is related to the effect of *technological changes* on *economies of scope*.<sup>344</sup>

"Economies of scope" are "'economies of joint production or distribution' that result 'from the use of processes within a single operating unit to produce or distribute more than one product or service.'"<sup>345</sup>

Convergence of the media and telecommunications markets is a result of the following developments:

- digitalisation (which allows all form of information content, including audio and video to be handled over the same networks in the same manner);
- the fall in the price of computing (allowing the development of sophisticated and affordable consumer equipment for encoding/decoding signals and interacting with multimedia information);
- reduced costs of bandwidth (and compression technologies which allow existing bandwidth to be used more efficiently); and
- telecommunications liberalisation (allowing new firms to enter previously protected markets).<sup>346</sup>

These developments are leading to convergence in both market structure and content in the media and telecommunications industries. With respect to market structure, "the tendency [is] for both broadcasters and telecommunications firms to offer high-bandwidth two-way communication

344. *Id.*

345. Eric W. Orts, *The Future of Enterprise Organization*, 96 MICH. L. REV. 1947, 1957 n.29 (1998) (quoting ALFRED D. CHANDLER, *SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM* 17 (1990)) (alterations omitted).

346. OECD PAPER ON CONVERGENCE, *supra* note 306, at 43. The Telecommunications Act of 1996 was a major piece of legislation that helped spur the convergence of the media and telecommunication markets in the United States. See also Marc L. Herskovitz, Note, *The Repeal of the Financial Interest and Syndication Rules: The Demise of Program Diversity and Television Network Competition?*, 15 CARDOZO ARTS & ENT. L.J. 177, 207-08 (1997) (discussing provisions of the Telecommunications Act of 1996).



services which simultaneously provide access to a number of different channels of video programming, voice telephony and access to the Internet."<sup>347</sup> In regard to convergence in content, "[t]he previously separate markets for content for newspapers, television, film and Internet publishing are overlapping and, to an extent, combining into a single market for interactive content."<sup>348</sup> While convergence is causing "'a gradual increase in the consumption of customised, interactive services,'" there remains continued "'demand for uncustomised multi-channel entertainment.'"<sup>349</sup>

The convergence of the media and telecommunications markets is already producing dramatic effects in the industry with respect to market structure, the level of competition and product and service offerings. As expected with increases in economies of scope, the market structure is changing through a "very large number of mergers and alliances."<sup>350</sup> Horizontal mergers and alliances are occurring between media and telecommunications firms, media and Internet firms, and Internet and telecommunications firms.<sup>351</sup> Vertical mergers and alliances are also occurring between content providers and Internet, media, and telecommunications firms.<sup>352</sup> These mergers and alliances are creating major multi-media conglomerates and making traditional lines of business designations such as "telephone companies" and "cable companies" obsolete.<sup>353</sup>

Convergence is increasing the number of firms offering entertainment content and the range of platforms from which entertainment content is launched. "Old telecommunications firms" and new start-ups, such as Internet firms, are joining traditional network broadcasters and cable operators in offering programming directly to consumers. These firms offer content in both passive (*i.e.*, one-way transmission) and interactive (*i.e.*, two-way communication) forms. New means of transmitting programming include digital satellite and terrestrial television, fiber optic cable, asymmetric digital subscriber line (ADSL),<sup>354</sup> and high bandwidth mobile communication.<sup>355</sup>

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347. OECD PAPER ON CONVERGENCE, *supra* note 306, at 43.

348. *Id.*

349. *Id.* (quoting DEPARTMENT OF TRADE AND INDUSTRY (U.K.), REGULATING COMMUNICATIONS: APPROACHING CONVERGENCE IN THE INFORMATION AGE 47 (July 1998)).

350. *Id.* at 46.

351. *Id.* (discussing horizontal mergers resulting from convergence).

352. *Id.* (discussing vertical mergers caused by convergence).

353. H. Peter Nesvold, Note, *Communication Breakdown: Developing an Antitrust Model for Multimedia*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 781, 851-52 (1996) (noting the effect of mergers between media and telecommunication companies).

354. ADSL is a means to deliver full multimedia information over a copper wire. OECD PAPER ON CONVERGENCE, *supra* note 306, at 37 (discussing ADSL technology).

Consumers now have ready access to numerous passive “traditional television channels” and a seemingly infinite number of interactive Internet sites.<sup>356</sup> The future promises an unlimited supply of “interactive television” once high bandwidth Internet broadcasting becomes a reality.<sup>357</sup>

4. Convergence increases mega-media companies’ demand for professional sports programming

Firms participating in the converging media and telecommunications markets are competing intensely for consumers.<sup>358</sup> Audience measurements in the United States “show that Web users already consumer [sic] 59 per cent less television than average viewers.”<sup>359</sup> As one commentator notes:

[One] relevant feature of television is that *audiences are relatively fixed*. If anything, people are watching less television, presumably because other forms of leisure and entertainment are competing with television. Furthermore, there is little evidence that increasing the number of channels or introducing pay TV channels increases average viewing hours, although pay TV subscribers may watch more hours on average than those who watch [free television] only. Therefore, as the number of channels or stations increases, the same audience is spread or fragmented among more channels. This means that, all things being equal, the introduction of pay TV takes away from [free television] broadcasters, and tends to reduce average audiences per station or per channel.<sup>360</sup>

Given the vast proliferation of passive and interactive “channels” and heightened competition for consumers, a key concern for mega-media companies in the converging market is obtaining access to attractive content,

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355. *Id.* at 36 (listing the various “High-Bandwidth Communications Links To The Consumer”).

356. The market penetration of pay television services is substantially greater in the United States than it is in Australia, though it is increasing rapidly in the latter country. *Id.* at 83 (noting that in 1995 approximately 70% of American television households subscribed to pay television services, compared to 3% in Australia); *See also* Elizabeth Knight, *Tuning Into View from the Couch*, SMH.COM.AU (noting that in Australia the television audience is migrating from free-to-air networks to cable television), available at <http://www.smh.com.au/news/9904/27/business/business8.html> (last visited Apr. 27, 1999).

357. OECD PAPER ON CONVERGENCE, *supra* note 306, at 44 (“Digital satellite and terrestrial television is expanding rapidly.”).

358. *FCC Approves Satellite TV Deal*, USATODAY.COM (noting that satellite television companies are the main competitor against local cable television companies), available at <http://www.usatoday.com/money/mds031.htm> (last modified Apr. 1, 1999).

359. OECD PAPER ON CONVERGENCE, *supra* note 306, at 49.

360. CENTO VELJANOVSKI, *PAY TV IN AUSTRALIA: MARKETS AND MERGERS* 28 (1999).

particularly professional sports league programming.<sup>361</sup> A mega-media company, however, faces many challenges with respect to acquiring professional sports content. The "increase in the number of bidders" for professional sports league programming increases the price American and Australian established leagues charge for their products.<sup>362</sup> For example in Australia, "[f]or the first time, at least five major telecommunications companies and broadcasters . . . are fighting it out for the richest deal in AFL history," which will double the amount the AFL currently receives for its transmission rights.<sup>363</sup> Convergence increases the likelihood that an established mega-media company will be outbid for the transmission rights of a professional sports league since many new firms will be eager to acquire content. One new competitor may even be an established league itself, which now has the capacity to transmit its own contests rather than sell its transmission rights to a mega-media company.<sup>364</sup> Moreover, not uncommonly an established league divides its transmission rights into different platform categories (e.g., free-to-air, cable television, digital television, and Internet broadcasting rights) and sells the exclusive rights to each category to a particular mega-media company.<sup>365</sup> A mega-media company that fails to purchase the exclusive rights to any category may find itself without professional sports content that is critical to its programming needs.

## 5. Mega-media companies' attempts to secure access to professional sports league content

### *a. Mega-media companies' ownership of individual clubs in traditional professional sports leagues*

In response to the high costs and uncertainty associated with buying

361. OECD PAPER ON CONVERGENCE, *supra* note 306, at 49 (noting that access to sports content is an important issue in the post-convergence market).

362. VELJANOVSKI, *supra* note 360, at 31-33 (noting that increasing the number of programming bidders will increase the programs' prices).

363. Patrick Smith, *TV Rights Battle Hots Up*, THEAGE.COM.AU, available at <http://www.theage.com.au/daily/990820/sport/sport13.html> (last visited Aug. 20, 1999).

364. *NBA Launches NBA.com TV*, NBA.COM (announcing the NBA's creation of NBA.com TV, "a new 24-hour television network" on satellite television that offers continuous coverage of the league), available at [http://www.nba.com/nbatv/nbatv\\_launches.html](http://www.nba.com/nbatv/nbatv_launches.html) (last visited Nov. 15, 1999).

365. Smith, *supra* note 363 (noting that in its next auction of transmission rights in 2001, the AFL may sell its free-to-air, pay television and Internet rights separately), available at <http://www.theage.com.au/daily/990820/sport/sport13.html>; Churchill, *supra* note 130 (noting that ESPN purchased the NFL's exclusive cable television rights), available at <http://www.theage.com.au/daily/990820/sport/sport13.html>.

professional sports league programming from traditional leagues, many mega-media companies are purchasing individual clubs in these leagues. Mega-media company ownership of professional sports clubs in traditional leagues is increasing with the advent of convergence as these firms seek to secure access to professional sports content. Mega-media company ownership of an individual club, however, is much more common in the United States than it is in Australia. Individual clubs in Australia are still primarily owned by non-profit community organizations, though equity investment in Australian leagues by both individuals and mega-media companies is increasing.<sup>366</sup> Examples of purchases by mega-media companies of individual clubs in recent years in the United States include News Corporation's purchase of the Los Angeles Dodgers in MLB and Time Warner, Inc.'s acquisition of the Atlanta Hawks, Atlanta Braves, and Atlanta Thrashers of the NBA, MLB, and NHL, respectively.<sup>367</sup>

A mega-media company receives many benefits from purchasing an individual club in a traditional league. With ownership of a club, a mega-media company acquires the club's local transmission rights and the club's share of league revenues.<sup>368</sup> Additionally, a mega-media company buys participation in the administration of the league and a voice in the league's determination of how and to whom to sell its league-wide transmission rights and other products.<sup>369</sup> Synergistic benefits also flow to a mega-media company from purchasing an individual club.<sup>370</sup> For example, Disney named

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366. Roy Masters, *Singleton Bucks the Trend, Buys Broncos Shares*, SMH.COM.AU (July 21, 1999) (noting that a Sydney businessman bought a share in the Brisbane Broncos, a publicly traded NRL club, "with a view to becoming a majority owner when News Ltd." reduces its equity in the club), available at <http://www.smh.com.au/news/9907/21/sport/sport6.html>.

367. Joanna Cagan & Neil deMause, *Bizbrawl*, N.Y. TIMES, Oct. 18, 1998 (Magazine), at 66-67 (detailing mega-media companies' purchases of individual clubs in American established professional sports leagues).

368. Stephen Ross, *Anti-Competitive Aspects of Sports*, 7 COMPETITION AND CONSUMER L.J. 125, 133 (1999) (noting that News Corporation's purchase of the Los Angeles Dodgers gave the firm ownership of the club's "valuable rights to the revenue from sale of local television"); Matt Rubenstein, *Ballpark Figures: The Real Cost of Sports Broadcasting Rights*, GILBERT & TOBIN 1, 6 (Apr. 1, 1998) ("Owning the team is a way of making sure you don't lose the [transmission] rights." (quoting Peter Barton, former CEO of Liberty Sports)), available at <http://www.gtlaw.com.au/templates/publications/default.jsp?pubid=119>.

369. Cagan & deMause, *supra* note 367, at 66 (noting that one of the advantages News Corporation sought from its attempt to purchase Manchester United, the world's most famous soccer club, was bargaining power in its negotiations with the English Premier League for the league's television rights).

370. *Id.* at 67 (noting the synergistic benefits mega-media companies receive from ownership of an individual club in a professional sports league); Chicago Prof'l Sports Ltd. P'ship v. National Basketball Ass'n, 95 F.3d at 597 [hereinafter *Bulls III*] (listing the benefits superstition WGN receives from telecasting Chicago Bulls' games).

the NHL expansion franchise it acquired in 1993 after the fictional hockey team in its 1992 movie "Mighty Ducks," whose "logo provided a key plot point for the sequel, 'D2,'" released in 1994.<sup>371</sup>

Despite the benefits of club ownership, purchasing an individual club in a traditional American or Australian league may not be a suitable means of satisfying a mega-media company's demand for professional sports programming. Though not generally the case, an established league may prohibit a public corporation—which almost all mega-media companies are—from purchasing an individual club. For example, the NFL effectively, though not expressly, precludes a public corporation from owning an individual club through extensive reporting requirements imposed on all club owners and an "uncodified . . . prohibition against transfer of any interest of a member franchise to the public."<sup>372</sup> William Sullivan, former owner of the New England Patriots, sued the NFL over its prohibition on public ownership after the league thwarted his plans to sell shares in the club to the public.<sup>373</sup> At trial, the jury found that the NFL's rule violated section 1 of the Sherman Act and awarded damages to Sullivan.<sup>374</sup> On appeal, the court held that Sullivan "had presented sufficient evidence of harm to competition in sale of ownership interests in NFL clubs" to support the jury's verdict, but reversed the judgment in favor of Sullivan because of "several prejudicial trial errors."<sup>375</sup> The NFL and Sullivan eventually settled the litigation out of court. No other owner or prospective purchaser of a club has challenged the NFL's bar on public ownership of franchises.

A mega-media company may not find club ownership a satisfactory option for obtaining access to professional sports league content for other reasons. Though it provides control over a club's local transmission rights, club ownership does not assure a mega-media company of procurement of the league's transmission rights. Owning a club may strengthen its bargaining position, but a mega-media company must still outbid its competitors. The degree of influence club ownership provides a mega-media company with respect to negotiations for a league's transmission rights may be reduced by another mega-media company's ownership of a club in the same league. For example, one would not expect News Corporation to have much sway with respect to MLB's auction of its transmission rights given that Disney and

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371. Cagan & deMause, *supra* note 367, at 67.

372. Hartel, *supra* note 35, at 605.

373. Sullivan v. National Football League, 34 F.3d 1091, 1096 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1994).

374. *Id.*

375. Hartel, *supra* note 35, at 606.

Time Warner, Inc. also own clubs.

The purchase price of an individual club may also deter a mega-media company's foray into club ownership. The monetary value of franchises in an established league has steadily climbed throughout the 1990s.<sup>376</sup> The purchase price for a club may seem particularly steep to a mega-media company when it takes into account that it may lose the benefits of owning an individual club by circumstances beyond its control such as a labor dispute. Having more than one mega-media company owner may exacerbate collective action problems since competing media owners may have difficulty cooperating with each other.<sup>377</sup>

*b. Mega-media companies' equity investment in playing facilities*

As an alternative or complement to purchasing an individual club, mega-media companies in the United States and Australia are making equity investments in new state-of-the-art playing facilities as a means of securing access to professional sports content.<sup>378</sup> Ownership of a playing facility allows a mega-media company to control physical access to the site and ensures the proper production of the transmission of a club's games. By owning a facility, a mega-media company also receives revenues from selling the naming rights to the facility and tickets to premium seating such as luxury suites. For example, through its forty percent equity interest in a new indoor arena in Los Angeles, the Staples Center, News Corporation receives a share of the \$100 million that Staples, Inc., an office supply company, paid for the naming rights to the facility.<sup>379</sup>

Where more than one team in a traditional league shares a facility for their regular season home games, a relatively common situation in Australia, a mega-media company's equity share in the facility may enhance its bargaining

376. GREENBERG & GRAY, *supra* note 82, at 15 ("The purchase price for sports franchises has continued to escalate throughout the 1990's in all four major sports leagues.").

377. Klapisch, *supra* note 88 (noting that it is "unlikely" that mega-media owners Time Warner, Inc., Disney, and News Corporation can agree to greater revenue sharing that would help solve MLB's competitive imbalance problem), available at <http://espn.go.com/mlb/features/01082162.html>.

378. Rubenstein, *supra* note 368, at 3 (noting that an organizer of a professional sporting event should have an equity stake in the venue "to make sure" it can secure appropriate access to the facility to protect its ability to sell transmission rights), available at <http://www.gtlaw.com.au/templates/publications/default.jsp?pubid=119>.

379. Cagan & deMause, *supra* note 367, at 66 (reporting the deal for naming rights to the new Los Angeles arena, home of the NBA's Lakers and Clippers and NHL's Kings franchises); Associated Press, *Reports: Deal To Give Murdoch Bigger Stake in Knicks, Rangers*, ESPN.COM (Apr. 2, 1999) (reporting that News Corporation's buyout of Liberty Media's 50% interest in Fox/Liberty Networks gives News Corporation a 40% interest in the Staples Center), at <http://www.espn.go.com>.

position with the league in negotiations for the league's transmission rights. The construction of Docklands Stadium, a new state-of-the-art outdoor facility in Melbourne, Australia, is instructive on this point. The primary tenant for the new stadium is the AFL, the most popular professional sports league in Melbourne. The AFL pays \$30 million (Aud) for a twenty-five year lease of the stadium at the end of which term the league receives freehold title to the facility.<sup>380</sup> Five AFL clubs use the stadium as a venue for at least part of their regular season home games.<sup>381</sup> The AFL also plans to sell its existing headquarters to finance its new lease agreement and to move its offices to the new stadium.<sup>382</sup>

"During the process to determine the developers of the Docklands Stadium," Channel Nine, controlled by PBL, and Channel Seven, two Australian national television networks, each aligned itself "in commercial arrangements with consortia bidding to develop the new stadium."<sup>383</sup> Not coincidentally, Channel Nine and Channel Seven are also the two networks that covet most earnestly the AFL's free-to-air television rights.<sup>384</sup> Ultimately, the consortium of which Channel Seven and News Ltd. were a part won the right to develop Docklands Stadium. Benefits Channel Seven receives from its \$99.5 million (Aud) investment in the stadium include the right to own and operate television studios within the stadium<sup>385</sup> and a share of the revenues from "the naming and external signage rights to the complex as well as the ticketing rights" to events held at the stadium.<sup>386</sup> Channel Seven hopes that its involvement in developing Docklands Stadium enhances its chances of acquiring the league's transmission rights in 2001 after the conclusion of the current contract between the league and network.<sup>387</sup>

Ownership of a playing facility does not, however, guarantee a mega-media company the transmission rights to the professional sports league or

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380. AFL ANNUAL REPORT, *supra* note 43, at 20 (detailing the AFL's lease agreement with Melbourne Docklands Authority).

381. *The AFL at Colonial Stadium*, AFL.COM.AU (detailing the AFL's lease of Colonial Stadium), available at [http://www.afl.com.au/lib/acrobat/cs\\_info.pdf](http://www.afl.com.au/lib/acrobat/cs_info.pdf) (last visited Dec. 24, 1999).

382. AFL ANNUAL REPORT, *supra* note 43, at 20 (noting that the AFL is transferring its "equity from Waverley Park to Docklands Stadium").

383. *TV Rights*, AFL.COM.AU, available at [http://www.afl.com.au/insideafl/annual\\_5.htm](http://www.afl.com.au/insideafl/annual_5.htm) (last visited Oct. 2, 1999).

384. *Id.* (noting that Channel Seven paid \$20 million (Aud) to win the "very intense bidding" with Channel Nine for the right to bid last for the AFL's free-to-air television rights).

385. Richard Hinds, *TV Rights for Indoor Matches Still Up for Grabs*, SMH.COM.AU (Nov. 18, 1999) (describing details of Channel Seven's investment in Docklands Stadium), available at <http://www.smh.com.au/news/9911/18/sport/sport10.html>.

386. *TV Rights*, *supra* note 383, available at [http://www.afl.com.au/insideafl/annual\\_5.htm](http://www.afl.com.au/insideafl/annual_5.htm).

387. *Id.*

club that uses the venue. The venue owner controls physical access to the facility.<sup>388</sup> The hirer of the facility (e.g., the league or individual club) owns the transmission rights to the event staged at the facility and may grant these rights to whomever it chooses.<sup>389</sup> Channel Seven's negotiations with the AFL for the league's transmission rights reflect these principles. Despite its equity share in Colonial Stadium, a facility at which the AFL plays at least thirty-five matches a year, Channel Seven must still bid against other mega-media companies for the AFL's transmission rights. For example, Channel Seven paid \$20 million (Aud) to outbid Channel Nine "for the right to bid last for the AFL's free to air television rights for the year 2001."<sup>390</sup> Thus, Channel Seven's long-term relationship with the league and its status as one of the AFL's new landlords does not ensure its acquisition of the AFL's transmission rights.

6. A media league provides a mega-media company with advantages over traditional means of procuring professional sports league programming

- a. *A media league reduces uncertainty costs associated with contracting with traditional leagues for transmission rights*

A media league may offer a mega-media company advantages over obtaining the transmission rights to an established league by direct purchase, ownership of an individual club, or investing in a playing facility.<sup>391</sup> By creating a media league, a mega-media company reduces the uncertainty costs of buying sports programming on the market.<sup>392</sup> Relative to contracting for the transmission rights to a traditional league, a media league lowers the risk to a mega-media company of a reduction in product quality from circumstances outside of its control.<sup>393</sup> A mega-media company can direct the resolution of any problems based on its costs and benefits—a more favorable

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388. Rubenstein, *supra* note 368, at 3 (noting that the owner of the venue controls access to the facility), available at <http://www.gtlaw.com.au/templates/publications/default.jsp?pubid=119>.

389. *Id.* ("Once the cooperation of the venue owner is secured, an event organiser . . . can feel confident in granting whatever broadcasting rights it wishes to whoever [sic] it chooses.").

390. *TV Rights*, *supra* note 383, available at [http://www.afl.com.au/insideafl/annual\\_5.htm](http://www.afl.com.au/insideafl/annual_5.htm).

391. Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433, 462-68 (1987) (explaining the benefits and costs of vertical integration).

392. Hovenkamp, *supra* note 76, at 14 ("The less certainty one firm has about others, the stronger the case for self production.").

393. See generally Werden, *supra* note 391, at 463 ("The use of contracts also imposes significant inherent limitations. One limitation inherent in the use of contracts is a very substantial attenuation of control.").



situation than being at the mercy of a traditional league. For example, a mega-media company can control the negotiations with a players' association and faces no threat of losing the transmission rights of its media league to a competing firm.

News Corporation's recent experiences in obtaining the transmission rights to premium rugby league and rugby union in Australia exemplify the greater degree of control a mega-media company has when it produces, rather than purchases, sports programming. As discussed in Chapter Two, in 1995 News Ltd. created Super League in order to obtain pay television rights to a premium rugby league competition.<sup>394</sup> To create Super League, News Ltd. had to procure all the necessary inputs for the league, such as players and facilities. Despite an intense bidding war for talent with the ARL, News Ltd. was successful in securing the services of a sufficient number of players to start Super League.<sup>395</sup>

News Corporation's Super League experience sharply contrasts with its involvement in the "Rugby War," another 1995 event. The Super League saga involving the sport of rugby league profoundly affected the sport of rugby union. After News Corporation started signing players for Super League, PBL, owner of the pay television rights to the ARL, sought to counter News Corporation's attempt to snatch rugby league programming away from it.<sup>396</sup> In response to PBL's inquiries, two businessmen proposed the creation of the World Rugby Corporation (WRC), a professional rugby union competition involving teams from all over the world.<sup>397</sup> The founders of WRC believed that a global rugby union competition provided PBL a much more valuable programming product than an Australian rugby league competition since rugby union is played internationally while rugby league is popular primarily only in a few Australian states and northern England.<sup>398</sup> Because it was providing significant capital for the bidding war against News Corporation in the Super League saga, PBL declined to back WRC at its inception, but expressed interest in the idea if the WRC's leaders could sign sufficient players for the venture.<sup>399</sup>

Simultaneously with WRC's development, the national Rugby Unions of

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394. COLMAN, *supra* note 5, at 3 (discussing the beginnings of Super League).

395. *Id.* at 126-27 (reporting the details of the bidding war between News Ltd., PBL, and Cable & Wireless Optus).

396. FITZSIMONS, *supra* note 323, at 3 (describing PBL's reaction to Super League).

397. *Id.* at 27 (describing the objectives of the WRC).

398. *Id.* at 4 (noting the strategy of using the WRC in response to News Corporation's Super League).

399. *Id.* at 21-22 (noting PBL's initial reaction to the WRC concept).

New Zealand (NZRU) and Australia (ARU), the governing bodies for the sport in each country, were reacting to the possible effect the Super League saga could have on rugby union.<sup>400</sup> At this time, rugby union was “amateur” in the sense that rugby union players were not officially paid, “though in different parts of the world amateurism [was] honoured more in the breach than the observance.”<sup>401</sup> Though “[a]mateurism ha[d] always made rugby union vulnerable to the loss of star players to . . . professional rugby league clubs,” the national unions feared a massive switch of rugby union players to rugby league in response to offers of large sums from either News Corporation or the ARL.<sup>402</sup>

To combat the Super League threat, the NZRU and ARU made rugby union professional (*i.e.*, players were openly paid) and created the “Perfect Rugby Product,” the sale of which to a mega-media company would generate revenues to fund player payments sufficient to dull any incentive to switch to rugby league.<sup>403</sup> The “Perfect Rugby Product” was a “Super 12” competition, consisting of teams from New Zealand, South Africa, and Australia, and a “Tri-Nations” Test series, in which the national teams of South Africa, New Zealand, and Australia played each other on a home and away basis.<sup>404</sup> The NZRU and ARU enlisted the support of the South Africa Rugby Football Union (SARU) because they believed that a truly international competition was a more attractive product than a competition involving only New Zealand and Australian teams.<sup>405</sup> The three national unions formed a new company, SANZAR (South Africa New Zealand Australia Rugby), which sold to News Corporation for \$550 million (U.S.) the exclusive transmission rights for ten years to the Super 12 competition and Tri-Nations series.<sup>406</sup>

After announcing its deal with News Corporation, the officials of the three national unions began recruiting rugby union players to play in the Super 12 and Tri-Nations competitions. Much to their surprise, these officials learned that a majority of the best rugby union players in each of the three countries had already signed contracts with WRC.<sup>407</sup> WRC had promised the players

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400. *Id.* at 15 (discussing the national Rugby Unions’ response to Super League).

401. Braham Dabscheck, *Trying Times: Collective Bargaining in Australian Rugby Union*, 15 SPORTING TRADITIONS 25, 27 (1998).

402. *Id.*

403. FITZSIMONS, *supra* note 323, at 18 (noting the national Unions’ plan to combat Super League).

404. *Id.* at 29-30 (describing the Perfect Rugby Product).

405. *Id.* at 17 (noting the NZRU’s and ARU’s desire to have South African teams in the new competition).

406. *Id.* at 95 (detailing the agreement between SANZAR and News Corporation).

407. *Id.* at 160 (noting that a majority of the best players in Australia, New Zealand, and South

very large salaries, more than the national unions were able to offer even after signing the deal with News Corporation.<sup>408</sup> The players' agreement with WRC, however, contained an important provision—the contracts were not binding unless WRC had secured either \$100 million (U.S.) by November 22, 1995, or executed contracts with commercial enterprises sufficient for it to meet its contractual obligations.<sup>409</sup> The NZRU, ARU, and SARU, therefore, began a campaign to convince the leading players that WRC would not be able to procure the necessary financial backing for its global league and to sign contracts with SANZAR, which provided guaranteed player payments at the time of contracting.<sup>410</sup> WRC, meanwhile, was in the process of trying to find a mega-media company to finance its operations. PBL gave WRC limited support, but was never wholly committed to the venture.<sup>411</sup> In fact, PBL's main reason for supporting WRC at all might have been to gain leverage over News Corporation in its battle for rugby league in Australia.<sup>412</sup>

Needless to say, News Corporation was not pleased to learn that it had committed significant resources to obtain transmission rights to a premium rugby union competition that was in danger of not having the top players in the sport. Though SANZAR officials were having some success in enlisting players, News Corporation viewed WRC as a real threat and moved to protect its investment. According to reports, an executive in News Corporation called Johann Rupert, the leader of M-Net, a leading South African media company.<sup>413</sup> M-Net, despite its long-term relationship with the SARU, lost valuable programming of South African rugby union when SANZAR made its deal with News Corporation and was earnestly negotiating with WRC for transmission rights.<sup>414</sup> In fact, WRC and M-Net were on the verge of closing a deal, which would have led to PBL increasing its involvement in WRC, when the News Corporation official contacted Johann Rupert.<sup>415</sup> The News Corporation official promised M-Net "sympathetic consideration" in the future if the company dropped its negotiations with WRC.<sup>416</sup> After being contacted by News Corporation, M-Net terminated its discussion with WRC.<sup>417</sup> With no

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Africa had signed contracts with WRC).

408. *Id.* at 67 (detailing WRC's five-tiered salary scale).

409. *Id.* at 66 (noting these conditions in WRC's player contracts).

410. *Id.* at 239 (detailing the national Unions' efforts to sign players away from WRC).

411. *Id.* at 248 (noting that PBL was never fully committed to WRC).

412. *Id.* at 163 (noting reasons for PBL's involvement in WRC).

413. *Id.* at 206 (describing Johann Rupert and M-Net).

414. *Id.* at 207 (discussing M-Net's involvement in the Rugby War).

415. *Id.* at 236 (discussing the negotiations between M-Net and WRC).

416. *Id.* at 237.

417. *Id.* at 237 (noting that M-Net abruptly terminated its negotiations with WRC).

alternative sources of funding, WRC failed to satisfy the conditions of its players' contracts and never commenced operations.<sup>418</sup> SANZAR secured the services of the rugby union players and started its Super 12 and Tri-Nations competitions in 1996.

The experiences of News Corporation in the Super League saga and the Rugby War speak to differences between a mega-media company's producing and purchasing professional sports programming. In each instance, News Corporation's objective was to procure the transmission rights to a premium professional sports league. In each situation, News Corporation obtained the transmission rights of a new professional sports league. In the Rugby War, News Corporation was aligned with the "establishment," while it was the "rebel" or "rival" in the Super League saga. Interestingly, in the Rugby War, though it contracted with the established rugby union competition organizers, News Corporation faced the risk that the quality of the transmission rights it had purchased would be significantly below its expectations at the time of contracting. News Corporation's peril was caused by the national unions' inability to guarantee that they could acquire the services of the leading rugby union players. News Corporation was forced to aggressively protect its investment in SANZAR. News Corporation's inability to rely on SANZAR to fulfill its contractual obligations highlighted the uncertainty inherent in purchasing professional sports programming on the market.

In the Super League saga, despite being the "rival league," News Corporation's concerns about meeting its expectations in acquiring the transmission rights to the new professional sports league did not hinge on the actions of another party charged with creating the new sporting competition. News Corporation had total responsibility for forming Super League. News Corporation's swift signing of players for Super League contrasted sharply with the initially passive approach of SANZAR officials in obtaining players for its Super 12 and Tri-Nations competitions. In producing Super League, News Corporation had greater control over obtaining transmission rights to a new professional sports league than it did in contracting with SANZAR in the Rugby War.

- b. A media league enables a mega-media company to create multiple brands of professional sports programming according to its needs*

A mega-media company can tailor a media league to fit its programming needs. If the mega-media company desires professional sports programming to generate large national audiences or drive subscriptions to a new pay

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418. *Id.* at 294 (noting PBL's decision to withdraw all support from the WRC).

service, then it likely needs to create a "premium brand" media league. A premium brand media league consists of evenly matched teams of high quality with star players on their rosters. If the premium brand media league is a rival league in the sport, then the quality of play in the media league should be at or near that of the established league since consumers are generally most interested in the league with the best and most exciting teams and players.

A premium brand media league that is a rival league may be a loss leader for a mega-media company since the firm is likely to have to offer top players salaries competitive with their current incomes to lure them away from the established league. The actual cost for a media league of any brand depends on a number of factors (*e.g.*, costs of technical production, acquiring use of playing facilities) though player payments are likely to be a mega-media company's greatest expenditure.<sup>419</sup> Even if creating a premium brand media league results in financial loss, the extent of loss to a mega-media company may be less than expected. Mega-media companies provide American and Australian established leagues with a substantial portion of the monies they use to pay players' salaries. Arguably, a mega-media company can use the funds it currently spends on purchasing short-term transmission rights to an established league to hire top quality players for a premium brand media league. Of course, controlling costs of players' salaries depends on a mega-media company conducting its premium media league in a financially astute manner and not engaging in an intense bidding war with the established league for talent. A mega-media company has the financial wherewithal to start and operate a well-managed premium brand media league.<sup>420</sup> As with content production in general, once a mega-media company expends the sums to create a media league, the marginal cost of making this programming "available to another consumer is often close to or equal to zero."<sup>421</sup>

If a mega-media company desires professional sports programming to attract the attention of a niche consumer group or to fill hours on a specialized sports channel, then it may not need to create a premium brand media league. Instead, a "generic brand media league" may suffice. A generic brand media league may be a second tier professional sports league in a sport with a major established league, or it may be the only professional sports league in a sport

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419. Ross, *supra* note 9, at 726 ("Sports leagues, however, are not subject to large fixed costs. Their primary costs are player salaries.").

420. Hovenkamp, *supra* note 76, at 110 (noting that "... a truly large firm such as General Motors ... undoubtedly has the resources to develop a network of competing professional football teams much like the NFL"); Associated Press, *Fox Entertainment Stock Soars*, USATODAY.COM (Nov. 11, 1998) (noting that News Corp. "raised \$2.8 billion (U.S.) by selling 18% of its entertainment and sports empire to the public"), available at [www.usatoday.com](http://www.usatoday.com).

421. OECD PAPER ON CONVERGENCE, *supra* note 306, at 7.

that is not widely popular among consumers. Since created for purposes other than attracting a large audience or subscribers, a generic brand media league need not have "star power." The actual costs of operating a generic brand media league, therefore, are likely lower than the costs of a premium brand media league.

The Extreme Games, or X Games, a creation of Disney, is an example of a professional sports competition tailored to the needs of a mega-media company trying to reach a particular consumer group. Disney has created the X Games to reach the Generation X audience, a demographic group interested in non-traditional sports, and to provide low cost programming for its ESPN and ESPN2 cable sports channels.<sup>422</sup> The X Games has an "Olympic" format with athletes from all over the world competing in qualifying competitions for a spot in the championship games.<sup>423</sup> The top athletes compete for gold, silver, or bronze medals at the X Games competition.<sup>424</sup> ESPN has created annual summer and winter versions of the competition.<sup>425</sup> The X Games are popular with consumers, especially the targeted audience, and very profitable for Disney.<sup>426</sup> In fact, the X Games generate a larger profit for Disney than its exclusive telecasts of NFL games on Sunday nights on ESPN.<sup>427</sup> Not surprisingly, given Disney's success with its X Games, other mega-media companies have created their own extreme sports competitions.<sup>428</sup>

*c. A media league provides synergy to a mega-media company*

In the post-convergence market, mega-media companies are seeking to

422. Sal Ruibal, *X-tremely Overexposed?*, USATODAY.COM (June 23, 1999) (noting that Disney annually receives 250 hours of "original, year-round X Games-oriented coverage" for its network and cable television channels), available at <http://www.usatoday.com/sports/ccovwed.htm>.

423. *X Trials Draws Top Athletes, Big Crowds in Louisville*, ESPN.COM (discussing a qualifying competition for the 1999 Summer X Games), at <http://espn.go.com/xgames/summerx99/gen/news/1999/990524/01273785.html> (last visited May 24, 1999).

424. *Id.* (noting participation of Andy Macdonald, 1998 Summer X Games silver medalist, in qualifying trials for 1999 Summer X Games).

425. *Id.* (noting competitors in 1998 Summer X Games seeking to qualify for 1999 Summer X Games).

426. Araton, *supra* note 331, at 63 (noting that the X Games have been "quite successful" according to ABC/ESPN sports president, Steven Bornstein).

427. Sal Ruibal, *In Focus*, USATODAY.COM (noting the profitability of the X Games for Disney), available at <http://www.usatoday.com> (last visited Mar. 9, 2000).

428. Ruibal, *supra* note 422 (reporting on NBC's creation of its Gravity Games), available at <http://www.usatoday.com/sports/ccovwed.htm>; Damien Murphy, *Xtreme? It's Over the Top*, SMH.COM.AU (noting the first Winter Xtreme Games in Australia), available at <http://www.smh.com.au/news/9908/23/national/national8.html> (last visited Aug. 23, 1999).

grow revenues by expanding their product and service offerings.<sup>429</sup> Today, a mega-media company is commonly involved in a number of entertainment enterprises, such as film production, distribution and exhibition, book publishing, and theme parks,<sup>430</sup> and launches content from several different platforms.<sup>431</sup> A primary objective of a mega-media company is to obtain synergy from its various operations.<sup>432</sup> A mega-media company hopes “that all [its] products and the efforts behind them will mesh and contribute to a chain reaction that creates more energy, awareness, and economic effect than any single aspect might have done on its own.”<sup>433</sup> In fact, many mega-media companies believe that “diversification into holdings which have synergy with their core business is part of a commercial vision and shareholder expectation.”<sup>434</sup>

Developing a “brand” suitable for cross-marketing across its product lines is an effective means for a mega-media company to obtain synergy from its operations.<sup>435</sup> A media league offers a mega-media company several opportunities to achieve synergy through branding. A mega-media company may create a media league to further one of its existing brands or to start a new brand upon which to promote its other operations. For example, Disney has turned ESPN, generally regarded as the most popular sports channel in the United States, into a brand. Disney has complemented ESPN with ESPN2, “a younger, hipper version of the original ESPN” that features alternative sports programming; ESPNNews, a twenty-four hour sports news channel; ESPN SportsZone, “the premier sports portal on the Internet;” ESPN *The Magazine*, a national sports magazine; the ESPN Club, a facility at Disney World that offers “visitors a chance to mingle with ESPN celebs;” and ESPN Zones, entertainment centers with video games, batting cages, giant television screens and a restaurant.<sup>436</sup> Disney has the X Games primarily to provide

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429. WOLF, *supra* note 3, at 89 (noting that diversification into other industries is one of the primary means for a mega-media company to increase its revenues).

430. *Id.* at xviii (noting the expansion of mega-media companies into a number of entertainment enterprises).

431. *Id.* at 89-91 (discussing the increase in number of platforms and the number of products on each platform).

432. *Id.* at 99 (noting that synergy is the driving force behind the numerous mergers of media and telecommunications companies in the 1990s).

433. *Id.* at 231.

434. PUBLISHING AND BROADCASTING LTD., SUBMISSION TO THE REVIEW OF BROADCASTING REGULATION BY THE PRODUCTIVITY COMMISSION 19, available at <http://www.indcom.gov.au/inquiry/broadcast/subs/sublist.html> (last visited Mar. 17, 2000).

435. WOLF *supra* note 3, at 226 (noting that many firms use a successful brand to sell other products and services).

436. *Id.* at 222-23 (discussing the ESPN brand).

programming for ESPN2, but has maximized revenues from this popular sporting competition by creating other X Games products and services that are marketed under the ESPN brand and used and sold in other ESPN enterprises.

A mega-media company may achieve similar synergies by developing a brand around a media league. Telecasts of the competition between the teams may be shown from a mega-media company's different platforms (*e.g.*, free-to-air or pay television, or Internet broadcast). In addition to broadcasting games, an Internet site devoted to the league may provide many benefits to a mega-media company such as providing brand awareness, up-to-date information on the league, its players, games, and events without the need for coverage by other media companies, a means for fans to interact more closely with players and coaches through chat rooms and email, and online sales of tickets and league merchandise.<sup>437</sup> The Internet site may also sponsor fantasy leagues (*i.e.*, a fictional league of teams developed by fans who play against each other based on the performances of players in actual games) based on its media league and use its telecasts and coverage of the games to complement its fantasy league operations.<sup>438</sup> If a mega-media company develops megaplexes (*i.e.*, large entertainment centers with cinemas, retail shops, and restaurants),<sup>439</sup> theme parks, or other entertainment venues, then it may include a theme restaurant and retail clothing stores based on its media league in these facilities. Players from the mega-media league may make appearances and sign autographs at these retail outlets to attract consumers. Players may also promote other products or services the mega-media company produces such as appearing in cameo roles in other television shows or endorsing particular products that carry the media league brand.<sup>440</sup> If it has film production capabilities, a mega-media company may produce a movie based on events occurring in its media league.<sup>441</sup>

A mega-media company may obtain further benefits from selling its media league brand to other firms. Since the main reason for creating a media league

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437. Sharon Raboin, *Caps' Owner Brings Sports into Net Age*, USATODAY.COM (Dec. 28, 1999) (discussing Ted Leonsis', President of America Online Interactive Properties Group, and majority owner of the NHL Washington Capitals, plans to use the Internet to build brand awareness of his club), available at <http://www.usatoday.com/sports/ccovtue.htm>.

438. Michael Hiestand, *Online Leagues of their Own*, USATODAY.COM (Oct. 6, 1999) (reporting on the exploding popularity of online fantasy leagues), available at <http://www.usatoday.com/sports/ccovwed.htm>.

439. WOLF, *supra* note 3, at 9-11 (discussing megaplexes).

440. *Id.* at 223 (noting that at the ESPN Club consumers can buy clothing endorsing "Bristol University of Football," a hypothetical university featured in ESPN commercials).

441. Michael Hiestand, *Big Impact for Play Action*, USATODAY.COM (Dec. 22, 1999) (reporting on the movie about a mythical professional football league based loosely on the NFL), available at <http://www.usatoday.com/sports/ccovwed.htm>.



is to secure a stable supply of professional sports league programming, a mega-media company is unlikely to sell the transmission rights to another mega-media company. A mega-media company, however, may deal such rights to a product or geographic market in which it does not operate. News Corporation's selling of the free-to-air rights to Super League in Australia to PBL because it did not operate a broadcast network in that country is an example of such a transaction.<sup>442</sup> A mega-media company may enter into joint ventures or alliances with other firms to produce products or services based on the media league that it could not offer alone. For example, a mega-media company and a financial institution may form an alliance to market a credit card where purchases made on the card entitle the consumer to credit towards tickets to media league games or merchandise. By creating a media league, a mega-media company is not only an owner of a professional sports league, but also "a sports/entertainment/media brand" developer and manager.<sup>443</sup>

### B. *Globalization of Professional Sports Leagues*

Technological developments in the telecommunications, computer, and transportation industries are reducing greatly the time and space constraints that previously hampered international transactions.<sup>444</sup> Mega-media companies and American and Australian professional sports leagues are becoming more global. Entry into new geographic markets is a means for both mega-media companies and established professional sports leagues to increase revenues.<sup>445</sup>

The globalization of economic markets in general, and professional sports leagues in particular, promotes media league creation in at least two ways. First, a mega-media company may use a media league to acquire programming to help establish consumer interest in its products in a new geographic market.<sup>446</sup> Since programming that focuses on local issues generally receives

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442. COLMAN, *supra* note 5, at 315 (noting News Ltd.'s sale of the free-to-air rights to Super League to PBL); See also FITZSIMONS, *supra* note 323, at 95 (noting that News Corporation's contract with SANZAR allowed it to on-sell the rights to the Super 12 competition).

443. Raboin, *supra* note 437 (noting that Ted Leonsis views himself "as a sports/entertainment/media brand manager" rather than a hockey team owner), available at <http://www.usatoday.com/sports/ccovtue.htm>.

444. GERALD SUSSMAN, COMMUNICATION, TECHNOLOGY, AND POLITICS IN THE INFORMATION AGE 137 (1997).

445. WOLF, *supra* note 3, at 89 (noting that in the future firms in the entertainment industry will have to look to "global expansion into less mature markets" in order to grow revenues).

446. *Id.* at 28 ("In the emerging world economy . . . successful businesses need star brands to bring consumers through the door.").

the highest ratings in any given market, a mega-media company may find beneficial the creation of a media league in a sport highly popular in the new geographic market.<sup>447</sup> A media league may be comprised of teams staffed primarily with players from the particular geographic area into which the mega-media company is entering. If the sport is played internationally, then the inclusion of star players from other countries may improve the quality and attractiveness of the media league.

Second, with respect to sports that are popular internationally, a mega-media company is well positioned to create a global professional sports league. The concept of a global professional sports league is similar to the "World Cup" competitions currently held in soccer, cricket, and rugby union in which teams representing different countries play each other every four years. Though several different formats are possible, a global professional sports league at base features teams from countries on two or more continents that play in an organized competition with a true "World Champion" crowned at the conclusion of league play.

Global professional sports leagues, though a topic of much conversation, are not yet in existence.<sup>448</sup> The increasing popularity of the World Cups and other competitions involving international teams, such as the Champions League in European soccer, foreshadows their creation.<sup>449</sup> The inclusion of teams from each country participating in a global league provides an element of local content to capture consumer attention across geographic markets. The large potential financial return from a global professional sports league is an incentive for a mega-media company establishing itself globally to undertake such an enterprise.<sup>450</sup> Reports of mega-media companies exploring the creation of international professional sports leagues show that these firms are cognizant of the revenues such a product may produce.<sup>451</sup>

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447. *Id.* at 290 (noting that despite globalization "a large part of the programming in every country will be . . . local stories"); AUSTRALIAN BROADCASTING AUTHORITY, DISCUSSION PAPER: REVIEW OF THE AUSTRALIAN CONTENT STANDARD 24 (1998), available at <http://www.aba.gov.au/what/program/pdf/acdpfin.pdf>.

448. Jeff Bradley, *Continental Clash*, ESPN.COM (Feb. 24, 1999) (noting that "there's plenty of talk of a World League" in professional soccer), at <http://espn.go.com/espnmagazine/vol2no5bradley.html>; Paul Kent & Steve Mascord, *Non-rebels With a Global Cause*, SMH.COM.AU (July 9, 1999) (noting discussions about a World League for the sport of rugby league), available at <http://www.smh.com.au/league/news/199907/09/9league2html>.

449. *Man United Stuns Bayern 2-1*, ESPN.COM (May 26, 1999) (reporting on Manchester United's capturing of the Champions League title in 1999), at <http://www.espn.go.com/soccer/news/1999/990526/0127757.html>.

450. Deutschman, *supra* note 320, at 73 (noting that News Corporation transmits programming to North American, Latin America, Europe and Asia).

451. *Private Company's Super League Plans Rejected*, CNNSI.COM (Aug. 25, 1998) (reporting

C. *Single Economic Entity Structure of a Media League Reduces the Threat of Antitrust Law Challenges to its Operations*

Conflicts in a traditional league often manifest themselves in the form of lawsuits alleging a violation of the antitrust laws. These lawsuits generally involve two basic fact patterns.<sup>452</sup> Individual clubs often file lawsuits against the league and other clubs when a league rule precludes a club from taking a particular action, such as relocating to a new geographic location, that the club believes is in its best financial interests. Traditional leagues also face lawsuits lodged by players challenging league rules that allegedly restrict their freedom of contract. Under both fact patterns, the plaintiffs generally argue that the traditional league is an association of independent economic entities and that the rule at issue is unlawful because it is an agreement, contract, or understanding which unreasonably restrains trade between horizontal competitors (*i.e.*, the individual clubs).

Whether a traditional league is a single economic entity for antitrust purposes is an issue of much debate whose resolution is beyond the scope of this paper.<sup>453</sup> American and Australian courts, however, predominantly conclude that traditional leagues are not single entities, thereby exposing them to judicial scrutiny under antitrust principles and, in Australia with respect to restrictions on players, the common law doctrine of restraint of trade.<sup>454</sup> As a result, "virtually every league rule or practice" of traditional American and Australian leagues is subject to "serious, unpredictable, and unavoidable antitrust risk."<sup>455</sup>

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elite European soccer clubs' rejection of a mega-media company's plan to create a premium international soccer league) (on file with author), *available at* <http://www.cnnsi.com>.

452. Drew D. Krause, Comment, *The National Football League's Ban on Corporate Ownership: Violating Antitrust to Preserve Traditional Ownership—Implications Arising From William H. Sullivan's Antitrust Suit*, 2 SETON HALL J. SPORT L. 175, 179 n.22 (1992) (listing cases involving American traditional professional sports leagues).

453. Davidson, *supra* note 65, at 174 n.14 (listing articles discussing the single entity issue).

454. *Bulls III*, 95 F.3d at 599 (noting that "most courts . . . have preferred" to characterize professional sports leagues as joint ventures rather than single firms); *News Ltd.*, [1996] 870 F.C.A. at \*106 (AustLII.edu.au, Austl. Case Law) (concluding that the ARL clubs competed against one another for inter alia "spectators, sponsors, and television viewers"); Davidson, *supra* note 65, at 172 (noting that Australian courts have held leagues' restrictions on players' freedom to contract to be illegal under the common law doctrine of restraint of trade). *But see* N. Am. Soccer League v. National Football League, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of certiorari) (arguing that a traditional professional sports league is a single economic entity for antitrust purposes).

455. Roberts, *supra* note 325, at 968. *See also id.* at 1015. Professor Roberts contends that:

The decisions that apply section 1 of the Sherman Act to the internal rules and conduct of sports leagues are so illogical, confusing, and inconsistent with one another that the rule of law has effectively been replaced by the ad hoc rules promulgated by the individual court that happens to hear a particular case.

An advantage of a media league relative to a traditional league is that its structure enables a mega-media company to operate the enterprise with less fear of antitrust challenge from member clubs or players. Since it owns all the teams, a mega-media company "may assert full control at any moment" if a subsidiary club fails to act in the best interests of the media league.<sup>456</sup> In addition, a mega-media company can structure its "rules, rewards, and sanctions in such a way" that the agendas of the individual club subsidiaries do not conflict with the objectives of the media league.<sup>457</sup> Through these means, a mega-media company can largely prevent a subsidiary club from taking a particular action that is detrimental to the proper functioning of the media league.

A mega-media company can act with little fear of antitrust challenge in the United States or Australia because a media league is a single firm for antitrust purposes. Under American antitrust jurisprudence, a parent corporation and its wholly owned subsidiaries are deemed to be incapable of conspiring with one another for purposes of section 1 of the Sherman Act.<sup>458</sup> The Australian Trade Practices Act's prohibitions against a corporation from making or giving effect to a contract or arrangement that has the purpose or likely effect of substantially lessening competition and exclusionary provisions<sup>459</sup> do not apply to a contract or arrangement the only parties to which are related companies.<sup>460</sup> That is, "the Trade Practices Act § 45 cannot be infringed by any arrangements between the separate legal entities within [the same] corporate umbrella."<sup>461</sup> Thus, avoidance of many of the legal challenges common to operating a traditional league supports a mega-media company's creation of a media league.<sup>462</sup>

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*Id.* See also Rosenbaum, *supra* note 311, at 730 ("[I]t is somewhat surprising that the precise law governing the relationship between professional sports leagues and the Sherman Act is so noticeably confused and unsettled.")

456. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-72 (1984).

457. Roberts, *supra* note 30, at 266 n.163.

458. *Copperweld*, 467 U.S. at 771 (concluding that "a parent and its wholly owned subsidiary must be viewed as . . . a single enterprise for purposes of §1 of the Sherman Act"); 15 U.S.C. § 1 (1994) ("Every contract, combination, . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."); *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (noting that § 1 only proscribes unreasonable restraints on trade).

459. Trade Practices Act, 1974, § 45(2); S.G. CORONES, COMPETITION LAW AND POLICY IN AUSTRALIA 202 (1990) (noting that an exclusionary provision under Australian law is analogous to a group boycott under American antitrust jurisprudence).

460. Trade Practices Act, 1974, § 45(8).

461. Warren Pengilly, *ARL v. Super League: What Does it Mean for Sporting Organisations?*, 5 COMPETITION & CONSUMER L.J. 77, 98 (1997).

462. Edward Mathias, Comment, *Big League Perestroika? The Implications of Fraser v. Major League Soccer*, 148 U. PA. L. REV. 203, 237 (1999) (noting that the benefits of a single entity

*D. A Mega-Media Company's Ability to Innovate in Response to Changing Consumer Preferences*

The decentralized management structure of a traditional league hinders its response to entreaties from consumers, broadcasters, and sponsors for improvements in its products.<sup>463</sup> The collective action requirements in a traditional league retard innovation for two reasons. First, "the entrepreneurial skills and foresight of [league] members . . . differ."<sup>464</sup> Unlike "[in] a competitive environment, [where] only one skilled entrepreneur need perceive an opportunity for innovation," a traditional league setting requires "each innovative idea [to] appeal to some entrepreneurs of below-average vision and ability."<sup>465</sup> Second, a league member may "hold out" from supporting a proposal in an attempt to extract compensation from the league members promoting the innovation.<sup>466</sup> "As a result of these features, [established leagues are] exceptionally conservative."<sup>467</sup>

Mega-media companies are innovators since they must have a heightened appreciation of consumer tastes and quickly react to changes in consumer preferences.<sup>468</sup> Often a mega-media company is led by one individual who has the ability to refocus rapidly the firm's operations based on a perception of the future of the industry.<sup>469</sup> Mega-media companies are willing to innovate with respect to their involvement in professional sports. These firms continue to introduce many innovations with respect to professional sports programming, such as showing new perspectives from which to view the game and expanding viewers' insight into the innermost recesses of sports.<sup>470</sup>

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structure may spur the creation of new professional sports leagues).

463. Roger G. Noll, *Major League Sports*, in *THE STRUCTURE OF AMERICAN INDUSTRY* 348, 382-83 (Walter Adams ed., 6th ed. 1982) (discussing the attributes of a traditional sports league that hinders its innovative abilities); COZZILLO & LEVINSTEIN, *supra* note 7, at 33 ("It is very difficult for [a traditional] league to alter its product significantly or to change the primary rules about how it conducts its business.").

464. Noll, *supra* note 463, at 381.

465. *Id.* at 381-82.

466. *Id.* ("[A] team owner, if his vote is critical, may collect some bribe from the proponents of change by initially holding out against the proposed change."); Hovenkamp, *supra* note 76, at 23 (noting that members of a joint venture may profit by retarding innovation).

467. Noll, *supra* note 463, at 382.

468. Hill remarks, *supra* note 282 (noting that firms involved in the professional sports industry must remember that the "consumer is keen").

469. WOLF, *supra* note 3, at 119-50 (discussing media moguls).

470. Deutschman, *supra* note 320, at 73 (noting that News Corporation's innovations in televising American professional sports leagues have made these "sports more lively and refreshingly

Mega-media companies typically embrace emerging sports as they become popular with consumers. Disney's promotion of the X Games and News Corporation's first-time broadcast on national network television in the United States of a professional fishing tournament show mega-media companies' receptive attitudes towards new sporting ventures.<sup>471</sup>

A mega-media company, understanding consumers' dynamic and diverse tastes in sports,<sup>472</sup> may prefer to satisfy consumer demands for changes in professional sports administration and programming by creating a media league instead of waiting for established leagues to develop or refine their products. That is, "the introduction of a [media league may be] a response to failure to change on the part of the established league[s]."<sup>473</sup> In a media league, a single firm will establish the objectives of the enterprise and have the power to direct the actions required to obtain these goals. The absence of multiple firms in the management hierarchy of a media league will greatly reduce the "below-average visionary" and "holdout" problems common to innovation in traditional leagues.

### *E. Availability of Players for a Media League*

Restrictions on player mobility and the player development systems of established leagues are not likely to be significant impediments to media league formation. In both the United States and Australia, players have mounted successful legal challenges against restraints on their ability to shop their services on the open market.<sup>474</sup> The remaining restrictions on player

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irreverent"); Thomas Kennedy, Comment, *Will America's Pastime Be a Part of American's Future?: An Antitrust Analysis that Enables Sports Leagues to Compete Effectively in the Entertainment Market*, 46 UCLA L. REV. 577, 606 (1998) ("[T]he Fox television network has veered from the traditional format to broadcasting professional sports.").

471. Rudy Martzke, *Fox Reels In Viewers for Fishing*, USATODAY.COM (Nov. 8, 1999) (noting that FOX's broadcast of the fishing tournament drew respectable ratings), available at <http://www.usatoday.com/sports/comment/colmart.htm>.

472. Sal Ruibal, *Adrenaline Fuels New Equipment*, USATODAY.COM (May 19, 1999) (noting a study by the Sporting Goods Manufacturers Association that participation in team sports declined in the 1990s and is predicted to do so in the 21st century), available at <http://www.usatoday.com/sports/mil003.htm>; Phil Derriman, *Running Game not Running the Best*, THE SYDNEY MORNING HERALD, Mar. 17, 1999, at 44 (noting studies showing that Australians' interest in traditional sports has not risen in the 1990s); David Brown et al., *The Games of the Future, Sport by Sport*, USATODAY.COM (May 19, 1999) ("Competition might be timeless, but the look and feel of your favorite sport will change in the next century."), available at <http://www.usatoday.com/sports/mil008.htm>.

473. Noll, *supra* note 463, at 382.

474. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1188-89 (D.C. Cir. 1978) (holding that the NFL draft violated § 1 of the Sherman Act); *Mackey v. National Football League*, 543 F.2d 606, 622 (8th Cir. 1976) (holding that the NFL's "Rozelle Rule" violated § 1 of the Sherman Act), *cert.*

mobility in established leagues are mostly indirect restraints, such as salary caps, and do not appreciably limit the supply of players to a mega-media company.<sup>475</sup> Though star players in established leagues now enter into longer-term agreements than they have historically,<sup>476</sup> a multi-year contract between a player and an individual club may not prevent a player from switching to a media league. "Clauses of personal service contracts that require an individual to work for a single enterprise for a long period of time have limited legal validity, as is demonstrated during periods of interleague competition, when a team that loses a player rarely succeeds in obtaining a judgment from the courts requiring him to fulfill his contract."<sup>477</sup> The present more open labor market lessens the availability of players to new professional sports leagues in some respects, however, since players now negotiate with all the individual clubs in the established league rather than being restricted to playing for a

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*dismissed*, 434 U.S. 801 (1977); *Philadelphia World Hockey Club v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972) (enjoining the NHL's enforcement of the reserve clause in players' contracts that precluded players from signing with a rival league); *Buckley v. Tutty*, (1971) 125 C.L.R. 353 (Austl.) (invalidating under the common law restraint of trade doctrine restrictions on players' mobility in the NSWRL); *Radovich v. National Football League*, 352 U.S. 445 (1957) (holding that the NFL's blacklisting of players who had played in a rival league constituted a Sherman Act claim); *Hughes v. Western Australian Cricket Assoc.*, (1986) ATPR ¶ 40-736 (Austl. Fed. Ct.) (holding that WACA's blacklisting of players who played in "rebel" tours of South Africa was illegal under the Trade Practices Act). See also Braham Dabscheck, *Playing the Team Game: Unions in Australian Professional Team Sports*, 38 J. INDUST. REL. 600, 605 (1996) ("[C]ourts [in Australia] have rejected rules that seek to limit the ability of players to take up employment in competitions not affiliated, or under the control of existing, or traditional, leagues.").

475. Alan M. Levine, Note, *Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports Leagues*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 243, 268 (1995) (noting that the NFL's standard player's contract allows a drafted rookie to sign with a rival professional football league, but the drafting NFL team retains his rights for three years). In the United States, a player mobility restraint is immune under the nonstatutory labor exemption from antitrust attack if it is included in a collective bargaining agreement between the league and the players' association. *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1203 (6th Cir. 1979) (applying the nonstatutory labor exemption). However, in Australia, a restriction on players' mobility, though approved by the players' union and exempt from the Trade Practices Act as part of an employment agreement, may still be challenged under the common law restraint of trade doctrine. Warren Pengilley, *Restraint of Trade and Antitrust: A Pigskin Review Post Super League*, 6 CANTERBURY L. REV. 610, 622 & n.46 (1997) (observing that collectively bargained for employment terms would be exempt under the Trade Practices Act, but subject to the common law doctrine of restraint of trade).

476. Associated Press, *New Football League Still a Work in Progress*, ESPN.COM (noting that young star players in the NFL now have longer term contracts with their clubs than they did when the USFL was created) (on file with author), at <http://www.espn.go.com> (last visited May 29, 1998).

477. Roger G. Noll, *The U.S. Team Sports Industry: An Introduction*, in GOVERNMENT AND THE SPORTS BUSINESS, *supra* note 28, at 1, 4. But see Hayden Opie & Graham Smith, *The Withering of Individualism: Professional Team Sports and Employment Law*, 15 U.N.S.W.L.J. 313, 342-46 (1992) (discussing Australian cases in which courts effectively enforced contract provisions requiring a player to play exclusively for an individual club).

single club.<sup>478</sup> Regardless of the effect of labor market restrictions in American and Australian established leagues, the growth of professional sports in the United States and Australia, as well as globally, has produced a surfeit of playing talent.<sup>479</sup> A mega-media company may further its recruiting efforts by offering additional employment opportunities in the entertainment industry, such as film and recording deals, to star players, who are increasingly becoming popular icons in the United States and Australia.<sup>480</sup> Thus, a mega-media company is not likely to face difficulties in finding players for its media league.

### III. A MEDIA LEAGUE HAS THE CAPABILITY TO AVOID THE PROBLEMS PLAGUING TRADITIONAL LEAGUES IN THE UNITED STATES AND AUSTRALIA

The attractiveness of a media league to a mega-media company as an alternative source of professional sports programming is enhanced by its ability to avoid problems present in traditional American and Australian leagues. Further, a mega-media company can organize its league in a way that corrects a significant ongoing problem in a traditional league in order to publicize the benefits of its venture.

#### A. *Single Entity Structure Allows a Media League to Avoid the Collective Action Problems Associated with Traditional Leagues*

Collective action problems prevalent in American and Australian leagues are not likely to arise in a media league. Unlike the disagreement among clubs in MLB, disharmony among club subsidiaries does not prevent a mega-media company from devising a system to achieve competitive balance in the media league. A mega-media company's control over the economic operations of the enterprise reduces the ability of club subsidiaries to maximize their financial

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478. *New Football League Still a Work in Progress*, *supra* note 476 (noting that free agency in the NFL may reduce the number of players available to join a new football league), at <http://www.espn.go.com>.

479. Rosenbaum, *supra* note 311, at 808 ("As a practical matter, there is a glut of qualified players for most professional sports."); *but see* DEMMERT, *supra* note 66, at 88 (observing that though there is a large surplus of athletes that can play professionally, there may be a shortage of star players).

480. DEMMERT, *supra* note 66, at 51-52 (noting that players may prefer to locate in a market that offers advertising and commercial advantages such as sponsorship and acting opportunities); Tom Farrey, *The L.A. Story: Opportunity*, ESPN.COM (Mar. 6, 1999) (reporting on the advantages athletes have received in pursuing acting careers by playing for a professional sports team in Los Angeles), at <http://www.espn.go.com/otl/actors/part3.html>.



returns in hopes of gaining an on-the-field competitive advantage.<sup>481</sup>

Like it does for its other employees, a mega-media company can establish the terms and conditions of employment for the players and other personnel in its media league. Even where it has to negotiate with a players' association with respect to employment terms, a mega-media company's bargaining position in such negotiations is stronger than that of traditional leagues. In dealing with a traditional league a player can threaten a lawsuit alleging an unreasonable restraint of trade among competing employers.<sup>482</sup> A mega-media company, on the other hand, can impose a player rule such as a minimum age restriction without fear of such lawsuits.

Finally, a mega-media company can decide, with little fear of reprisal, the number and geographic location of the club subsidiaries in its media league. A mega-media company, like any other corporation, can determine the extent of its business operations. A court is highly unlikely to force a mega-media company to admit into its media league an individual club it does not own.

*B. A Mega-Media Company's Ability to Address Problems Particular to Traditional Leagues: Franchise Free Agency and Community Ownership of Clubs in a Media League*

To engender public support, a mega-media company may organize its media league in a manner that addresses a significant problem common to traditional leagues. For example, a mega-media company may find it beneficial to implement features into its media league that would reduce the possibility of team relocations since franchise free agency is a problem in American traditional leagues that upsets many consumers.<sup>483</sup>

A scheme that promises to solve franchise free agency is community ownership of individual clubs in a professional sports league.<sup>484</sup> The success of the Green Bay Packers of the NFL, the only community-owned professional sports franchise in a major league in the United States, which has never changed geographic locations despite playing in the smallest metropolitan area of any NFL club, testifies to the efficacy of community-ownership in

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481. Mason & Slack, *supra* note 55, at 420 (noting that a solution to the franchise free agency problem is to have a league where one firm owns all the teams).

482. *Brown v. Pro-Football, Inc.*, 518 U.S. 231, 250 (1996) (holding that a players' association has the option of either negotiating with a traditional professional sports league as a union or decertifying its union status to allow an antitrust suit against the league).

483. *See supra* notes at 116-157 (discussing franchise free agency in the NFL).

484. Bast, *supra* note 142, at pt. 3 (arguing that community ownership of individual clubs in a professional sports league is the best solution for franchise free agency), *available at* <http://www.heartland.org/sprtsstad.htm>; Hartel, *supra* note 35, at 592 (proposing community-based public ownership of NFL franchises as a means to eliminate franchise free agency).

preventing franchise relocations.<sup>485</sup> Similarly, the movement of an individual club to a new geographic location in pursuit of a sweetheart stadium deal is relatively rare in Australia, where almost all the clubs are non-profit community-owned corporations.<sup>486</sup>

A number of barriers reduce the likelihood of a dramatic increase in the number of community-owned clubs in American traditional leagues in the near future.<sup>487</sup> Presently, the major American established leagues do not permit non-profit public ownership of individual clubs<sup>488</sup>—the NFL grandfathered in the Green Bay Packer's corporate structure when the club joined the league in 1921.<sup>489</sup> Given the escalating value of professional sports franchises, many communities are unlikely to be able to raise the monies needed to purchase an individual club in an American traditional league. Finally, strong opposition to community ownership of clubs is likely to come from current club owners, stadium construction interests, and players that benefit from franchise free agency.

A mega-media company has the resources to create community-owned clubs. A mega-media company can offer members of the public the opportunity to purchase an equity investment in the individual club in its metropolitan area and a voice in any decision to relocate the club to another geographic location.<sup>490</sup> A mega-media company can choose from a number of for-profit and non-profit organizational schemes to provide for community ownership of individual clubs in a media league.

In a for-profit scheme, for example, a mega-media company can create

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485. Bast, *supra* note 142, at pt. 3 (noting the "impressive results" that community-ownership of the Green Bay Packers has achieved with respect to eliminating the harms associated with franchise free agency), available at <http://www.heartland.org/sprtsstad.htm>; Hartel, *supra* note 35, at 595 (noting that Green Bay is the smallest market in the NFL).

486. Ross, *supra* note 368, at 133 (noting that for the North Melbourne Kangaroos, an AFL club, to move to Sydney, the club's members would have to vote in favor of the relocation).

487. Bast, *supra* note 142, at pt. 3 (discussing the barriers to nonprofit ownership of individual clubs in American professional sports leagues), available at <http://www.heartland.org/sprtsstad.htm>.

488. Hartel, *supra* note 35, at 592 (noting the proposed bill, "Give Fans a Chance Act" would have prohibited American established professional sports leagues from banning public ownership). But see Brian R. Cheffins, *Sports Teams and the Stock Market: A Winning Match?*, 32 U.B.C. L. REV. 271, 278 (1998) (noting that "league rules do not pose as serious a problem [to public ownership of clubs] as they might appear to at first glance").

489. Hartel, *supra* note 35, at 593 (noting that the NFL granted the Green Bay Packers an exemption from its ownership rules).

490. Bast, *supra* note 142, at pt. 3 (suggesting that NBC and Turner Broadcasting, at the time considering whether to start an American professional football league, should fund the development of a professional league comprised of community-owned teams), available at <http://www.heartland.org/sprtsstad.htm>.

publicly listed club subsidiaries that offer two categories of stock.<sup>491</sup> The "investment tier" of stock is publicly traded with no restrictions on the amount any person can purchase so that the mega-media company can retain a majority of these shares. Shareholders of investment stock receive dividends, but do not have any voice on whether to relocate the team to another geographic location.

The other category of shares is "souvenir stock." The amount of souvenir stock any one person can hold is limited so as to encourage widespread ownership throughout the community. The souvenir stock does not pay dividends and can only be resold to the mega-company at its original price. Holders of the souvenir stock have the right to vote on relocating the club to a new location. The articles of incorporation state the voting requirements for moving the club. At the outset, a mega-media company can vest in itself the right to move the club. The voting rights of holders of souvenir stock would be suspended until a certain number of shares are sold. Hence, the mega-media company maintains total control over the relocation decision until the community provides sufficient support for the club. Once a community backs the club to the desired level, a mega-media company has little incentive to move the club to a new location. To encourage the sale of souvenir stock, a mega-media company can offer additional benefits such as a personal seat license (*i.e.*, the right to purchase season tickets), discounts on club merchandise, and the right to attend the team's awards dinner or to meet the players at a special autograph outing. Since they receive little or no pecuniary benefits from owning shares, the majority of purchasers of souvenir stock are likely be those community members with a desire to keep the club in the same geographic location.<sup>492</sup>

A mega-media company can also use a non-profit structure to establish community ownership of clubs in a media league. Each individual club is a non-profit corporation. A mega-media company sells stock in each non-profit corporation on terms similar to that for the "souvenir stock" discussed above.<sup>493</sup> The holders of the souvenir stock are given the right to vote on relocation issues. Like in a for-profit scheme, the mega-media company can retain control over the relocation decision until the community demonstrates sufficient commitment to the media league.

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491. Hartel, *supra* note 35, at 597-600 (discussing a for-profit community-owned professional sports franchise).

492. *Id.* (providing the details stated in the text with respect to organizing a for-profit community-owned professional sports club).

493. Bast, *supra* note 142, at pt. 3 (discussing the details of the Green Bay Packers' non-profit organizational structure), available at <http://www.heartland.org/sprtsstad.htm>.

The community-ownership arrangement, if any, best suited for a mega-media company depends on firm-specific factors such as its management structure, its expertise in non-profit organizations, the extent of control it wants over club relocations, and the tax advantages of creating a for-profit or non-profit media league.<sup>494</sup> Like with other organizational decisions in a media league, a mega-media company has to decide whether the potential benefits outweigh any losses from allowing members of the community to have a voice in deciding whether to move a club to a new geographic area.

#### IV. OBSTACLES TO MEDIA LEAGUE FORMATION AND SUCCESS

Formation of a media league is not without difficulty. A mega-media company is reasonably well equipped to meet pragmatic concerns such as planning the structure of the league, acquiring personnel, staging games, and transmitting the contests over its media platforms. Other obstacles implicating various aspects of the legal regimes of the United States and Australia exist, however, that deserve closer examination.

Government regulations, particularly anti-siphoning rules, on a mega-media company's production, distribution, and exhibition of sports programming may reduce the benefits of creating a media league. A mega-media company may find it necessary to turn to constitutional law in both the United States and Australia to protect itself from onerous anti-siphoning rules. Depending on the structure of a media league, players may attack a mega-media company's employment practices on antitrust, contract, or labor law grounds. A mega-media company may also find itself engaged in legal proceedings with respect to gaining access to playing facilities.

##### *A. Government Regulation of a Mega-Media Company's Production, Distribution and Exhibition of Sports Programming Over Multiple Media Platforms*

Government regulation of the converging media and telecommunications industries may limit the synergy a mega-media company can derive from a media league. A rule prohibiting a mega-media company from producing, distributing and exhibiting professional sports programming bars media league creation. The repeal in the United States of prohibitions on vertical integration in the film and television industries indicates the unlikelihood of a comprehensive restriction on a mega-media company's in-house production,

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494. Mitten & Burton, *supra* note 9, at 141 (noting that a professional sports franchise may want to limit public ownership to a minority interest in the club in order to reduce unwanted interference with its operations).

distribution and exhibition of a professional sports league. Anti-siphoning rules, which mandate the transmission of sporting events on free-to-air television, pose a greater disincentive to media league creation.

1. Restrictions in the United States on vertical integration of producing, distributing and exhibiting programming content

A media league is analogous to situations where movie studios and television networks vertically integrate the production, distribution, and exhibition of programming content. The history of restrictions in the United States on vertical integration by networks and movie studios teaches that such government regulations are not likely to bar a mega-media company from producing and disseminating a media league.

a. *Vertical integration in the motion picture industry: Paramount Pictures and its progeny*

In *United States v. Paramount Pictures, Inc.*,<sup>495</sup> the United States Supreme Court upheld a trial court's finding that certain motion picture studios had violated the Sherman Act by conspiring to fix the prices and conditions under which feature films were distributed and exhibited throughout the country.<sup>496</sup> Several movie studios had vertically integrated the production, distribution and exhibition of feature films.<sup>497</sup> Though not illegal per se under the antitrust laws, the Court was concerned about the effect of vertical integration in the motion picture industry.<sup>498</sup> Hence, the Court remanded to the trial court to "determine whether the vertical integration of the [movie studios] . . . was conceived with an intent to monopolize or . . . confer[red] a known monopoly power."<sup>499</sup>

The trial court answered this question in the negative since the government could not disprove that a purpose for the movie studios' vertical integration was "to obtain an outlet for their pictures and a supply of film for their theatres."<sup>500</sup> Despite this finding, the trial court held that the vertical integration of the movie studios "in this particular case [was] illegal" because

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495. 334 U.S. 131 (1948).

496. *Id.* at 147 (concluding that sufficient evidence existed to support the trial court's findings with respect to a horizontal conspiracy among the movie studios).

497. *Id.* at 140 (discussing the movie studio defendants).

498. *Id.* at 174 (noting that the majority of the Court did not believe that a movie studio's vertical integration was illegal per se).

499. *United States v. Paramount Pictures, Inc.*, 85 F. Supp. 881, 885 (S.D.N.Y. 1949).

500. *Id.* at 893.

it was "a definite means of carrying out the [anti-competitive] restraints and conspiracies" between the firms.<sup>501</sup> The court thus ordered the movie studios to divest themselves of any equity interest in motion picture theatres and barred them from owning any theatres in the future.<sup>502</sup>

Forty years after being barred from owning theatres, a movie studio, Warner Communications, Inc., moved the court for "permission to engage in the business of exhibiting motion pictures."<sup>503</sup> Warner argued that changes in the film industry since *Paramount Pictures* justified lifting the prohibition on its purchasing theatres without prior judicial consent.<sup>504</sup> In particular, Warner noted the proliferation and success of independent film distributors and exhibitors and the influence of the "'aftermarkets' of television and videocassettes," which had reduced market concentration and barriers to entry in the film industry.<sup>505</sup> The United States government supported Warner's motion. The government "point[ed] out that there is nothing inherently anticompetitive about a vertical merger" and that "the evolution of the motion picture industry since *Paramount Pictures* makes it improbable that Warner could or would endeavor to use its exhibition assets to stifle competition."<sup>506</sup>

Due to the changes in the motion picture industry, the court granted Warner's motion. The court agreed with the government that Warner's ownership of movie theatres would be pro-competitive by improving its "ability to compete with distributors not subject to the decretal restrictions."<sup>507</sup> Consequently, the court ordered the elimination of any restrictions prohibiting Warner's present or future ownership and operation of movie theatres.<sup>508</sup> This decision marked the end of the prohibition on a movie studio vertically integrating the production, distribution, and exhibition of films.<sup>509</sup>

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501. *Id.*

502. *United States v. Loew's, Inc.*, 882 F.2d 29, 30 (2d Cir. 1989) (discussing consent judgments governing movie studios' ownership of theatres). These "orders were once described as the greatest economic victory ever achieved by the Department of Justice." *Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485, 497 (1982) (quoting Walter Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1, 5 (1951)).

503. *Loew's, Inc.*, 882 F.2d at 30.

504. *Id.* at 31 (reviewing Warner's arguments).

505. *Id.*

506. *Id.* at 32-33 (citing *Fruehauf Corp. v. Federal Trade Comm'n*, 603 F.2d 345, 351 (2d Cir. 1979)).

507. *Id.* at 34.

508. *Loew's, Inc.*, 882 F.2d at 34 (ordering the elimination of restrictions on Warner's right to own and operate movie theatres).

509. Nesvold, *supra* note 353, at 840 n.362 (noting "Sony Corporation's vertical integration of movie production, distribution, and exhibition since the 1989 *Loew's, Inc.* decision").

*b. Vertical integration of the production, distribution and exhibition of television programming: FCC's financial interest and syndication rules*

In 1970, the Federal Communications Commission (FCC), the government agency authorized to regulate "the use of the electromagnetic spectrum to propagate communications signals,"<sup>510</sup> adopted the "prime time access" and "financial interest and syndication" ("fin-syn") rules.<sup>511</sup> The FCC enacted these rules to rectify an "unhealthy situation"<sup>512</sup> in which the three major television networks at that time, NBC, ABC, and CBS, controlled "the entire network television production process from idea through exhibition,"<sup>513</sup> including "access to the crucial prime time evening television schedule."<sup>514</sup>

The concern behind the rules was that the networks, controlling as they did through their owned and operated stations and their affiliates a large part of the system for distributing television programs to American households, would unless restrained use this control to seize a dominating position in the production of television programs. That is, they would lever their distribution "monopoly" into a production "monopoly."<sup>515</sup>

The prime time access rule prevented network affiliates in the top fifty television markets from airing more than three hours of network programs between the hours of 7 p.m. and 11 p.m.<sup>516</sup> In practice, this rule opened up an extra thirty minutes of prime time for television stations to buy first run syndicated programming from non-network, independent producers or to broadcast local programming.<sup>517</sup>

The financial interest and syndication rules . . . forbade a network to syndicate (license) programs produced by the network for rebroadcast by independent television stations—that is, stations that were not owned by or affiliated with the network—or to purchase syndication rights to programs that it obtained from outside producers, or otherwise to obtain a financial stake in such programs. If the network

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510. *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992) (citing the Communications Act of 1934, 47 U.S.C. § 151 (1988)).

511. *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 474 (2d Cir. 1971) (discussing FCC's adoption of prime time access and financial interest and syndication rules).

512. *Id.* at 475 (quoting FCC, Report & Order, 35 Fed. Reg. 7417-26 (May 7, 1970)).

513. *Id.* at 482 (quoting FCC, Report & Order, 35 Fed. Reg. 7417-26 (May 7, 1970)).

514. *Id.* at 475 (quoting FCC, Report & Order, 35 Fed. Reg. 7417-26 (May 7, 1970)).

515. *Schurz Communications, Inc.*, 982 F.2d at 1045.

516. *Mt. Mansfield Television, Inc.*, 442 F.2d at 476.

517. *Id.*

itself had produced the program it could sell syndication rights to an independent syndicator but it could not retain an interest in the syndicator's revenues or profits.<sup>518</sup>

Through these rules the FCC intended to introduce more competition into the market for television programs.<sup>519</sup>

The United States Department of Justice also questioned the legality under the antitrust laws of the television networks' programming practices. The government filed a lawsuit against each of the three major television networks alleging that their control "over the production, acquisition and exhibition of television programs shown during the prime-time hours" violated the Sherman Act.<sup>520</sup> According to the government, each firm had "monopolized the trade in commerce of production of prime-time television programming shown on [its network of television stations]" and restrained trade through its "contracts for the purchase of programs produced by independent producers."<sup>521</sup> To avoid litigation on the merits, each network entered into a consent judgment with the government. These agreements prohibited each network "from acquiring syndication and other distribution or profit shares in television programs produced by others"<sup>522</sup> and restricted the number of hours per week it could air television programs it produced.<sup>523</sup>

Akin to the waning over time of the legitimacy of the prohibition on vertical integration in the motion picture industry, the FCC's prime time access and fin-syn rules lost support in the years after their enactment. Dramatic changes in the television industry after 1970 reduced the relevancy of these prohibitions. The widespread acceptance of cable television and videocassette recorders reduced the networks' percentages of purchases of video and film programming, television advertising revenues, and prime-time audiences.<sup>524</sup> The amount of competition in the television industry also increased with the creation of a fourth major television network, News Corporation's FOX Broadcasting Corporation, and the rise in the number of independent television stations.<sup>525</sup> Furthermore, critics exposed the fallacy of

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518. *Schurz Communications, Inc.*, 982 F.2d at 1045.

519. *Mt. Mansfield Television, Inc.*, 442 F.2d at 474 (citing the FCC's Notice of Proposed Rule Making preceding the adoption of the prime time access and fin-syn rules).

520. *United States v. NBC*, 449 F. Supp. 1127, 1129 (C.D. Cal. 1978).

521. *Id.* at 1130.

522. *Id.* at 1131.

523. *Id.* (reviewing consent judgment between the government and NBC).

524. *Schurz Communications, Inc.*, 982 F.2d at 1046 (discussing changes in television industry since 1970).

525. *Id.*



the "'leverage' theory, which taught that a firm having economic power in one market would use it to acquire a monopoly of another market," upon which the FCC's rules were based.<sup>526</sup> The increased concentration of non-network firms producing prime-time programming after the adoption of the prime time access and fin-syn rules suggested that these rules were not having their intended effect of increasing competition among independent program producers.<sup>527</sup>

Based on these developments, the FCC reviewed whether to repeal the prime time access and fin-syn rules. An internal staff study recommended that the agency abandon these regulations.<sup>528</sup> In 1991, the FCC repealed the 1970 rules, but replaced them with "a revised set" of fin-syn rules.<sup>529</sup> The 1991 rules, though much more complicated than the 1970 rules, were analogous to the consent judgments between the government and the networks in that they provided that "no more than 40 percent of a network's own prime-time entertainment schedule may consist of programs produced by the network itself."<sup>530</sup> The networks, believing that the evolution of the television industry justified the abolition of all regulations on their production, acquisition, and exhibition of programming, sought judicial review of the 1991 rules, petitioning the court to invalidate them.<sup>531</sup>

The court granted the networks' petition. The administrative record supporting the 1991 rules was insufficient to show that they were "a reasonable response to a problem that the agency was charged with solving."<sup>532</sup> Specifically, the FCC had failed "to consider the possibility that the unrestricted sale of syndication rights to networks would strengthen the production industry . . . and thereby increase programming diversity by enabling a sharing between fledgling producers and the networks of the risks of new production."<sup>533</sup> The agency neglected to analyze the risk its new fin-syn rules posed to competition in the program industry though the Justice Department had pressed this argument during the rule-making proceeding.<sup>534</sup>

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526. *Id.* at 1047.

527. *Id.* at 1046-47 (noting that the FCC's rules had hindered, not helped, competition in the production of prime-time programming).

528. *Id.* at 1047 (noting recommendation of "[a]n extensive staff study" to abandon the 1970 rules).

529. *Schurz Communications, Inc.*, 982 F.2d at 1047.

530. *Id.*

531. *Id.* at 1048 (noting the networks challenge to the FCC's 1991 rules).

532. *Id.* at 1049.

533. *Id.* at 1051.

534. *Schurz Communications, Inc.*, 982 F.2d at 1051 (noting the position of the Justice Department during the rule-making process).

and the consent decrees against the networks had expired in 1990.<sup>535</sup> Because the FCC's "articulation of its grounds [was] not adequately reasoned," the court vacated the 1991 fin-syn rules.<sup>536</sup>

After the invalidation of the 1991 rules, the FCC changed its position with respect to the need for regulating a network's production of television programming. In 1993, the agency issued "a new set of modified fin-syn rules"<sup>537</sup> that were much less restrictive than the 1970 and 1991 rules and were to be phased out in two years.<sup>538</sup> By 1996, the FCC had completely repealed all of its fin-syn and prime time access rules.<sup>539</sup> The repeal of these restrictions thus allowed a network to decide for itself without government intervention the amount of in-house programming to produce and broadcast and whether to retain and acquire syndication rights.<sup>540</sup>

*c. Absence of restrictions on a mega-media company's vertical integration of a professional sports league*

Because of the elimination of government restrictions in the United States on vertical integration in the film and television industries, a mega-media company has little reason to fear express prohibition of its production, distribution and exhibition of a professional sports league.<sup>541</sup> The United States government's approval of mergers between mega-media companies formed for the purpose of combining entertainment content operations with distribution outlets further suggests that the government is not likely to challenge a mega-media company's creation of a professional sports league. In fact, the elimination of the fin-syn rules has promoted these vertical mergers, such as Disney's purchase of ABC/Capital Cities.<sup>542</sup>

The Australian legal landscape is devoid of features analogous to *Paramount Pictures* and the fin-syn rules. In Australia, a mega-media

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535. *Id.* at 1050-51 (noting the expiration of the consent judgments against the three major networks in 1990).

536. *Id.* at 1050.

537. Herskovitz, *supra* note 346, at 197-98.

538. *Id.* at 198 (discussing 1993 fin-syn rules).

539. *Id.* at 177-78 (noting FCC's repeal of prime time access and fin-syn rules).

540. *Id.* at 181 (noting the freedom of networks to produce and broadcast as much in-house programming as they wish).

541. BERRY & WONG, *supra* note 17, at 33 (quoting the testimony of the late Howard Cosell, famous American television sports commentator, during Senate hearings discussing an antitrust exemption for the NFL, that *Paramount Pictures* may preclude the NFL from owning a cable television network on which all league contests would be transmitted).

542. Herskovitz, *supra* note 346, at 181 (discussing Disney's purchase of the ABC television network after the repeal of the fin-syn rules).

company's production and dissemination of a professional sports league face the same scrutiny as vertical organizations in other industries. That is, a mega-media company, in response to a government inquiry, only has to show that its media league operations do not have the purpose nor the effect or likely effect of substantially lessening competition.<sup>543</sup> A mega-media company can satisfy this standard by showing the procompetitive aspects of a media league.

## 2. Anti-siphoning regulations

Government regulations of real interest to a mega-media company creating a media league are anti-siphoning rules that restrict the amount of professional sports programming that can be shown on pay television. Such rules jeopardize the financial returns a mega-media company may receive from a media league. Though anti-siphoning regulations currently do not exist in the United States, the FCC has enacted them in the past and has evinced a willingness to do so in the future. Australia has anti-siphoning rules that extensively limit the amount of sports programming on cable television. An examination of the challenges a mega-media company may make against the application of anti-siphoning rules to a media league reflects differences in the protection constitutional law provides free expression and private property in the United States and Australia.

### *a. Review of anti-siphoning regulations*

#### i. United States

With the growth of cable television in the United States in the late 1960s came concern from members of the public and government that cable television operators would outbid the free-to-air television networks for the rights to popular programs resulting in these programs no longer being available free of charge.<sup>544</sup> Sporting events, it was believed, were in particular danger of being diverted, or siphoned, from networks to cablecasters.<sup>545</sup> The

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543. Trade Practices Act, 1974, § 47 (Austl.) (stating the elements of exclusive dealing).

544. M. Agnes Siedlecki, Note, *Sports Anti-Siphoning Rules for Pay Cable Television: A Public Right to Free TV?*, 53 IND. L.J. 821, 821 (1978) (discussing the FCC's anti-siphoning rules). "Siphoning is said to occur when an event or program currently shown on conventional free television is purchased by a cable operator for showing on a subscription cable channel." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 25 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977).

545. Siedlecki, *supra* note 544, at 822 (noting reasons for sports anti-siphoning rules); Ira Horowitz, *The Implications of Home Box Office for Sports Broadcasts*, 23 ANTITRUST BULL. 743,

likelihood that specific sporting events (e.g., Super Bowl or World Series) would be siphoned to pay television was thought to be higher than the diversion of non-specific events (e.g. regular season games) because of the greater inelasticity of demand for the former than for the latter.<sup>546</sup>

In response to these concerns, the FCC, in 1975, issued anti-siphoning rules designed to "prevent 'siphoning' of... sports material from conventional broadcast television to pay cable."<sup>547</sup>

Under the rules, a "specific" event... was denied to pay TV, subscription, or cable, if it had been telecast on conventional TV during any one year of the previous five years. "Nonspecific" sports events, which could be divided into the four major categories of preseason and regular season home and away games, became available to pay TV on the following basis: (a) if fewer than 25 percent of the events in a given category were broadcast live over conventional TV during that season among the preceding five years in which the most events in that category were telecast, then the number of events available would be the remaining events not telecast during the highwater-mark season; (b) if, however, 25 percent or more of the events in a given category were broadcast live during the highwater-mark season, then only 50 percent of the remaining events may be made available to pay TV. Additionally, any reduction in the number of conventional telecasts from the highwater-mark figure would require a proportionate reduction in the number of events available to pay TV.<sup>548</sup>

In addition to the above restrictions, the FCC also prohibited "cablecasters from devoting more than 90 percent of their cablecast hours to... sports programs."<sup>549</sup>

Members of the cable television industry, the Justice Department, and other parties challenged the validity of the anti-siphoning rules.<sup>550</sup> The Court of Appeals in *Home Box Office v. FCC* held that the "rules exceeded the FCC's jurisdiction over cable television,"<sup>551</sup> were arbitrary and capricious and

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753 (1978) (noting the unique characteristics of sporting events).

546. Horowitz, *supra* note 545, at 756 (discussing the siphoning of specific and non-specific sporting events).

547. *Home Box Office, Inc.*, 567 F.2d at 28.

548. Horowitz, *supra* note 545, at 749-50.

549. *Home Box Office, Inc.*, 567 F.2d at 19.

550. Siedlecki, *supra* note 544, at 828 (discussing the suit attacking the anti-siphoning rules).

551. *Id.*

unconstitutional under the First Amendment.<sup>552</sup> The court started its analysis by noting that the FCC's "regulatory authority over cable television [was] not *carte blanche*."<sup>553</sup> Rather, the FCC "[could] only exercise authority over cable television to the extent 'reasonably ancillary' to the Commission's jurisdiction over broadcast television."<sup>554</sup> Because the FCC admitted that it had "no statutory authority to dictate entertainment formats,"<sup>555</sup> the court concluded that the anti-siphoning rules were an *ultra vires* act of the agency.<sup>556</sup> According to the court, "[t]he very essence of the . . . sports rules [was] to require the permission of the Commission 'to commence . . . programming, including program format services, offered to the public.'"<sup>557</sup>

Even assuming the FCC's jurisdiction over cable television, the court determined that the anti-siphoning rules were illegal. Upon judicial review of its orders, the Commission was required to demonstrate a "rational connection between the facts found and the choice made."<sup>558</sup> Because the administrative record was devoid of evidence supporting the FCC's assertions that sporting events were migrating from free-to-air television to cable television and that persons without access to cable would lose access to sports programming if siphoning were to occur, the court concluded that the anti-siphoning rules were arbitrary and capricious.<sup>559</sup>

Finally, the court decided that the anti-siphoning rules violated the First Amendment rights of cable television operators. Since the anti-siphoning rules regulated the competition between broadcasters and cablecasters for the same audience, the court subjected the regulations to the four-part test set forth in *United States v. O'Brien*.<sup>560</sup> To pass scrutiny under *O'Brien*, the anti-siphoning rules had to "(1) . . . fall within the constitutional power of the government, (2) further an 'important or substantial government interest,' (3) be 'unrelated to the suppression of free expression,' and (4) impose no greater restriction on First Amendment freedoms 'than is essential to the furtherance'

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552. *Home Box Office, Inc.*, 567 F.2d at 49.

553. *Id.* at 26.

554. *Id.* (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)).

555. *Id.* at 31.

556. *Id.*

557. *Home Box Office, Inc.*, 567 F.2d at 31 (quoting *In re Deployment of Policy re: Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858, 859 (1976) (Memorandum Opinion and Order)).

558. *Id.* at 35 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

559. *Id.* at 37, 39 (reviewing the administrative record supporting the anti-siphoning rules).

560. *Id.* at 47-48; Phillip M. Cox II, Note, *Flag on the Play? The Siphoning Effect on Sports Television*, 47 FED. COMM. L.J. 571, 578 (1995) (discussing *Home Box Office, Inc.*).

of the governmental interest.”<sup>561</sup> The court concluded that the anti-siphoning rules were within the constitutional power of government and unrelated to the suppression of free expression, since their narrow purpose of protecting the viewing rights of those unable to obtain cable was content neutral.<sup>562</sup> The anti-siphoning rules, however, failed the second and fourth prongs of *O’Brien*. The lack of evidence in the record showing that siphoning was actually occurring made it impossible for the FCC to demonstrate that the anti-siphoning rules furthered an important or substantial government interest.<sup>563</sup> The anti-siphoning rules were “grossly overbroad” since they precluded cable operators from showing sports events that broadcasters would clearly choose not to telecast.<sup>564</sup>

After *Home Box Office* until 1992, cable networks, and the amount of sports programming they carried, proliferated dramatically.<sup>565</sup> In response to concerns about increased siphoning of sporting events to pay television, Congress in the 1992 Cable Act ordered the FCC to “conduct an ongoing study on the carriage of local, regional, and national sports programming by broadcast stations, cable programming networks, and pay-per-view services.”<sup>566</sup> Pursuant to this mandate, the FCC “sought information and comment on a number of issues regarding the movement of sports programming from broadcast to cable television”<sup>567</sup> in order “to determine whether any legislative or regulatory action”<sup>568</sup> was needed in this area.

The FCC found that the “number of sports events shown on cable television” had dramatically increased since 1980.<sup>569</sup> “[T]his increased cable exposure,” however, had not “led to a concomitant decrease in the number of sports events shown on broadcast television.”<sup>570</sup> Rather, the data showed that there was “a tremendous amount of sports programming on broadcast

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561. Cox, *supra* note 560, at 578 (quoting *O’Brien*, 391 U.S. at 376-88).

562. *Home Box Office, Inc.*, 567 F.2d at 48-49 (applying *O’Brien*); Cox, *supra* note 560, at 578.

563. *Home Box Office, Inc.*, 567 F.2d at 50.

564. *Id.*

565. Cox, *supra* note 560, at 580.

566. *In re Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992, Inquiry into Sports Programming Migration*, Interim Report, 8 F.C.C.R. 4875 ¶ 1 (1993) [hereinafter *Anti-siphoning Interim Report*] (quoting Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385 § 26, 106 Stat. 1502 (codified as amended at 47 U.S.C. § 521 (1988 & Supp. IV 1992))).

567. *Id.* ¶ 1.

568. *Id.* ¶ 3.

569. *Id.* ¶ 85.

570. *Id.*

television" which was generally increasing.<sup>571</sup> "The 'marquee' events, such as the Super Bowl . . . remain[ed] on broadcast television."<sup>572</sup> In addition, only a nominal fraction of American television households did not have access to pay television sports programming via cable or satellite technology. Hence, "the consequence of migration [would not be] loss of access to sports programming, but the need to pay a fee to acquire it."<sup>573</sup> According to the FCC, the cost of subscribing to pay television to acquire sports programming was not likely to be burdensome for the average consumer.<sup>574</sup> Upon final review, the FCC concluded that there was "no evidence of migration" of sports events from free-to-air to pay television.<sup>575</sup> Thus, the Commission "discern[ed] no case for additional government intervention in the sports programming market at this time."<sup>576</sup>

Despite their current absence, anti-siphoning rules may return to the United States. As the number of subscriber-based platforms offering programming increases with advances in technology, more sports events are likely to be shown on pay mediums.<sup>577</sup> Whether significant migration of sports programming from free-to-air networks to pay services will follow these technological innovations is uncertain.<sup>578</sup> The FCC's position is, however, that it "shall not hesitate to act, consistent with its statutory authority" if "any significant threat to . . . access" to sports programming develops.<sup>579</sup>

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571. Anti-siphoning Final Report, *supra* note 90, ¶ 167. See also Cox, *supra* note 560, at 582 (noting that the FCC found that broadcasters aired "more sports programming than ever before").

572. Anti-siphoning Final Report, *supra* note 90, ¶ 167.

573. *Id.* ¶ 163.

574. *Id.* ¶ 164; Brett T. Goodman, *The Sports Broadcasting Act: As Anachronistic as the Dumont Network?*, 5 SETON HALL J. SPORT L. 469, 504-05 (1995).

575. Anti-siphoning Final Report, *supra* note 90, ¶ 173.

576. *Id.* ¶ 167.

577. Anti-siphoning Interim Report, *supra* note 566, ¶ 80 (discussing the effect of technological advances on sports programming migration).

578. Horowitz, *supra* note 545, at 766-67 (arguing that the total migration of sports programming to pay television is "unthinkable"). But see Cox, *supra* note 560, at 585 (noting that "many lawmakers" sense an imminent threat of significant sports programming siphoning).

579. Anti-siphoning Interim Report, *supra* note 566, ¶ 180. Whether Congress or the FCC should adopt anti-siphoning rules is a complex issue the resolution of which is beyond the scope of this paper. Van Glish, *supra* note 29, at 79 (presenting arguments for and against anti-siphoning rules); Anti-siphoning Final Report, *supra* note 90, ¶¶ 141-43 (summarizing positions of members of the television industry for and against anti-siphoning rules); Horowitz, *supra* note 545, at 768 (concluding that anti-siphoning rules are not needed to obtain an optimal mix of sports programming on free and pay television); but see Cox, *supra* note 560, at 573 (concluding that government action is needed to ensure free access to the most popular sports programming). See also Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 464 (1990) (arguing that a professional sports league's packaged sale of broadcast rights to free and pay

## ii. Australia

The introduction of cable television in Australia in 1995 raised fears about a reduction of sports programming on free-to-air television.<sup>580</sup> In order to prevent the migration of major sporting events to subscription television, the government passed anti-siphoning legislation.<sup>581</sup>

Section 115 of the Broadcasting Services Act 1992 ("BSA") empowers the Minister for Communications, the Information Economy and the Arts to list sporting events that should be televised free to the general public.<sup>582</sup> As a condition of holding a subscription television license, a licensee must not acquire the rights to televise an event on the anti-siphoning list unless:

(a) a national [public] broadcaster<sup>583</sup> has the right to televise the event; or

(b) a commercial television network covering greater than 50% of the Australian population has acquired the rights to televise the event.<sup>584</sup>

"In other words, a pay TV operator cannot acquire the right to televise a listed event (even where such rights are limited to televising the event on pay TV) until a national or commercial broadcaster has acquired the right to televise the event."<sup>585</sup> "The rights acquired by the subscription licensee must . . . be rights not greater than the rights of the free-to-air broadcaster to televise the event."<sup>586</sup> For example, the owner of the transmission rights to a sporting event may not sell a commercial broadcaster the right to televise a one hour highlights package of the event and a cable operator the right to televise the event live.<sup>587</sup> Under the anti-siphoning rules, "a subscription broadcast licensee can never acquire exclusive rights to a listed event."<sup>588</sup>

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television firms is an unreasonable restraint of trade in violation of § 1 of the Sherman Act if the agreement reduces overall viewership of the league's contests).

580. AUSTRALIAN PRODUCTIVITY COMMISSION'S DRAFT REPORT ON BROADCASTING 232 (Oct. 1999) [hereinafter BROADCASTING REPORT] (discussing basis for anti-siphoning rules in Australia).

581. *Id.*

582. Broadcasting Services Act, 1992, § 115 (Austl.) (authorizing the Minister to create anti-siphoning list).

583. Australia has two public national free-to-air broadcasters, the Australian Broadcasting Company (ABC) and Special Broadcasting Services (SBS).

584. Brendan Moylan, *Media Policy and Anti-Siphoning*, 16 COMM. L. BULL. 16, 17 (Winter 1997). See also Broadcasting Services Act, 1992, pt. 6, sched. 2, cl. 10(1)(e) (Austl.).

585. Moylan, *supra* note 584, at 17.

586. *Nine Network Australia Pty. Ltd. v. Australian Broadcasting Authority*, (1997) 143 A.L.R. 8, 16 (Lockhart, J.) (Fed. Ct. Austl.), *aff'd*, (1997) 143 A.L.R. 516 (Full Fed. Ct. Austl.).

587. *Id.* ("The right to televise highlights of a cricket match is not substantially the same as the right to broadcast the match itself. . . .").

588. Moylan, *supra* note 584, at 17.



Free-to-air broadcasters, however, may acquire exclusive transmission rights to a listed sporting event and then sell the pay television rights to a cable operator.<sup>589</sup>

Pursuant to section 115, the Minister has created a comprehensive list of sporting events.<sup>590</sup> A subscription television licensee may acquire without restriction the rights to any sporting event not on the anti-siphoning list. An event is "automatically delisted one week after [it] has occurred."<sup>591</sup> The Minister may also delist an event if "the national and commercial broadcasters have had 'a real opportunity to acquire, on a fair commercial basis, the right to broadcast the event' and they have not done so 'within a reasonable time.'"<sup>592</sup>

The Australian anti-siphoning legislation is the subject of much criticism. The anti-siphoning list is arguably too broad since it includes events never before aired on free-to-air television and covers more events than the free-to-air broadcasters can technically, or practically, telecast.<sup>593</sup> According to some commentators, the delisting procedure is so cumbersome that a subscription television licensee cannot complete the process in sufficient time to arrange for the live transmission of a scheduled event.<sup>594</sup> The anti-siphoning rules effectively allow free-to-air broadcasters to prevent the live telecasts of events on pay TV by not purchasing the transmission rights to listed events or by acquiring the exclusive transmission rights to a listed event and not selling the pay television rights to a cable operator.<sup>595</sup> Nor do the anti-siphoning provisions "actively encourage[] free to air broadcasters to exercise the rights they have acquired."<sup>596</sup>

The Australian government has enacted "anti-hoarding" amendments to the BSA to respond to this last criticism.<sup>597</sup> The anti-hoarding amendments

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589. *Id.*

590. BROADCASTING REPORT, *supra* note 580, at F.1-F.3 (quoting anti-siphoning list).

591. *Id.* at 233.

592. *Id.* (quoting Broadcasting Services Act, 1992, § 115(2) (Austl.)).

593. Moylan, *supra* note 584, at 19; Malcolm Knox, *Alston's Tougher TV Rules to Give Sports Fans a Fuller Picture*, THE SYDNEY MORNING HERALD, June 30, 1999, at 44 (noting argument of cable operator "that 5,000 hours of sport were protected by anti-siphoning rules [in 1998], yet less than 30 per cent of that was broadcast free-to-air").

594. BROADCASTING REPORT, *supra* note 580, at 233 (discussing criticisms of the anti-siphoning legislation).

595. Moylan, *supra* note 584, at 18.

596. BROADCASTING REPORT, *supra* note 580, at 233. *See also* Sportsvision Australia Pty. Ltd. v. Tallgen Pty. Ltd., (1998) 44 N.S.W.L.R. 103 (Bryson, J.) (New South Wales Sup. Ct. May 22, 1998) (AustLII.edu.au, Austl. Case Law) (unreported) (noting that the anti-siphoning laws do not compel a commercial broadcaster to televise an event to which it owns transmission rights).

597. Broadcasting Services Amendment Bill (No.1), 1999 (Austl.) [hereinafter Anti-hoarding Amendments], available at <http://www.aph.gov.au>.

require commercial broadcasters to offer to the national public broadcasters the right to purchase, for a nominal charge, the free-to-air rights to an event they do not plan to transmit live.<sup>598</sup> According to the Minister, the purpose of the anti-hoarding amendments is to “encourage free to air broadcasters to be more realistic when acquiring broadcasting rights to major sporting events.”<sup>599</sup> The effectiveness of these provisions at preserving the live transmission of sporting events of national interest is questionable.<sup>600</sup> The national public broadcasters need not accept the commercial broadcasters’ offer and free-to-air broadcasters are not required to sell any pay television rights they hold to cable operators.<sup>601</sup> Thus, the anti-hoarding amendments “cannot guarantee that events will be shown live.”<sup>602</sup>

The Australian anti-siphoning legislation is due to expire on December 31, 2004.<sup>603</sup> Nevertheless, the present rules may not survive until then. The anti-competitive nature of the current legislation is generating many calls for reform. “The anti-siphoning provisions are a direct limitation on competition between free to air and subscription broadcasters—that is, they give the commercial broadcasters a competitive advantage over the subscription broadcasters.”<sup>604</sup> Advocates for reform argue that a more equitable and effective means of achieving the purpose behind the anti-siphoning rules is to preclude free-to-air and subscription broadcasters from negotiating contracts that exclude the other form of broadcasting. The Australian government is currently considering this proposal.<sup>605</sup>

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598. *Id.* § 146A.

599. Media Release, Senator Richard Alston, Better Coverage of Sport on Television (July 19, 1999) (quoting Senator Richard Alston, Minister for Communications, the Information Economy and the Arts), available at <http://www.dcit.gov.au/nsapi-graphics>.

600. BROADCASTING REPORT, *supra* note 580, at 233.

601. *Id.* But see Joanne Court, *Media Policy and Anti-Siphoning—Part Two*, 16 COMM. L. BULL. 16, 18 (Spring 1997) (arguing that an economically rational free-to-air broadcaster would sell any pay TV rights to a sports event it was not showing).

602. BROADCASTING REPORT, *supra* note 580, at 233.

603. Rory Sutton, *The Flawed Philosophy of Anti-Siphoning*, 14 COMM. L. BULL. 1, at 1 (Summer 1994) (“[T]he anti-siphoning rules are designed to apply for ten years only. . . .”); *Anti-siphoning Rules for Pay TV and Sport* (quoting anti-siphoning list expiration provisions), available at <http://www.dcit.gov.au/nsapi-graphics> (last visited July 19, 1999).

604. BROADCASTING REPORT, *supra* note 580, at 233.

605. *Id.* at 234 (noting that the Commission is “inclined” to recommend anti-siphoning legislation reform); *Plan to Pull Plug on Anti-siphoning*, *Sport Review*, SMH.COM.AU (“A Federal Government task force has recommended the eventual relaxation of anti-siphoning laws to allow major sports to be shown only on pay television.”), available at [www.smh.com.au/news/9912/03/sport/sport17.html](http://www.smh.com.au/news/9912/03/sport/sport17.html) (last visited Dec. 3, 1999).

b. *Constitutional law challenges a mega-media company may assert against anti-siphoning rules applied to a media league*

An important consideration for a mega-media company creating a media league is whether to air its contests on free-to-air or pay television. A mega-media company's programming mix depends on many factors such as the estimated audience size for its media league telecasts, anticipated revenues from advertisers and pay television subscribers, and the impact its programming decision has on consumers' attitudes toward the league.<sup>606</sup> If anti-siphoning rules preclude a mega-media company from implementing its preferred programming strategy, then it may mount a legal challenge against such regulations.

i. United States

Assuming the absence of jurisdictional and evidentiary defects similar to those found in *Home Box Office*, a mega-media company has to resort to constitutional law to challenge anti-siphoning rules in the United States. In particular, a mega-media company may assert that anti-siphoning rules violate its First Amendment rights to free speech. A mega-media company may argue that anti-siphoning rules specifically regulating sports programming are content-based regulations and thus "presumptively unconstitutional and subject to strict scrutiny."<sup>607</sup> In the alternative, a mega-media company may argue that anti-siphoning rules do not pass muster under the content neutral test of *O'Brien*. The FCC believes that *O'Brien* provides the correct First Amendment standard in this context.<sup>608</sup> Given the precedent of *Home Box Office* and the FCC's position, the *O'Brien* test is the First Amendment hurdle that anti-siphoning rules must clear.<sup>609</sup>

The anti-siphoning rules at issue in *Home Box Office* failed the second and fourth prongs of *O'Brien*.<sup>610</sup> The court in that case, however, intimated that sufficient evidence of sports programming migration would provide the

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606. Siedlecki, *supra* note 544, at 824 (explaining the pricing strategies for broadcasters and cable operators); Horowitz, *supra* note 545, at 753 (discussing considerations for airing sports event on free or pay television).

607. Anti-siphoning Final Report, *supra* note 90, ¶ 140 n.211.

608. *Id.*

609. Siedlecki, *supra* note 544, at 834 (positing that "[a]ny new sports anti-siphoning legislation . . . will have to meet" *O'Brien*). A complete exegesis of the proper First Amendment standard under which to analyze any future anti-siphoning rules must await enactment of such rules and their particular application to a media league.

610. *Home Box Office, Inc.*, 567 F.2d at 49-50.

government an important and substantial interest for enacting anti-siphoning rules.<sup>611</sup> Hence, assuming an adequate record for future regulations, a mega-media company's First Amendment challenge to anti-siphoning rules hinges substantially on the fourth prong of *O'Brien*. That is, a mega-media company has to show that the anti-siphoning rules, as applied to its media league coverage, are more restrictive than what is essential to further the government's interest in providing sports programming to those unable to afford pay television. To make this showing, a mega-media company may point to the unlikelihood of a competing free-to-air broadcaster airing its media league contests.<sup>612</sup> Arguably, the application of anti-siphoning rules to a mega-media company's programming of its media league "curtail[s] the flow of programming to those served by cable and willing to pay for it, with a consequent loss of diversity and unnecessary restriction of... First Amendment rights."<sup>613</sup>

If unsuccessful in using the First Amendment to block application of anti-siphoning rules, a mega-media company may seek to recoup any financial losses these regulations cause by asserting a regulatory takings claim under the Fifth Amendment. A mega-media company has property rights, including federal copyrights, to the accounts and descriptions of its media league games as well as in the telecasts of the games it produces.<sup>614</sup> The Takings Clause of the Fifth Amendment states that "'private property [shall not] be taken for public use, without just compensation."<sup>615</sup> By forcing a mega-media company to provide free access to its media league programming, the government arguably violates the Fifth Amendment.<sup>616</sup>

A mega-media company's success on a Fifth Amendment claim depends on the effect the anti-siphoning rules have on its return on its media league venture and the future direction of regulatory takings jurisprudence. To date, the Supreme Court has not extended to holders of personal property rights the same takings protection it has to holders of real property rights.<sup>617</sup> Under

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611. *Id.*

612. *Id.* at 50.

613. *Id.*

614. *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490, 494 (W.D. Pa. 1938) (holding that a sports club has property rights in the "news, reports, descriptions, or accounts" of its games).

615. Paul W. Garnett, *Forward-Looking Costing Methodologies and the Supreme Court's Takings Clause Jurisprudence*, 7 COMM'LAW CONSP'CTUS 119, 120 (1999) (quoting U.S. CONST. amend. V).

616. Mitten & Burton, *supra* note 9, at 137 (noting that a proposed federal law that would require a professional sports club relocating to a new city to reserve its trademarks for the club subsequently locating in the former host city raises "an intriguing Takings Clause issue").

617. Garnett, *supra* note 615, at 121 (noting that the Supreme Court has not applied in the non-

present law, a holder of a personal property right is not likely to succeed on a takings claim unless it can show that the government regulation deprives it of all economic benefit from the property.<sup>618</sup> A mega-media company is likely to have difficulty satisfying this test. Future anti-siphoning rules are unlikely to prohibit a mega-media company from showing any games on pay mediums. Even with a prohibition on all pay television telecasts, a mega-media company receives an economic benefit from airing its media league games on free-to-air television. Unless the Supreme Court increases takings protection for holders of personal property rights, a mega-media company faces a tough task in recouping from the government financial losses on its media league caused by anti-siphoning rules.

## ii. Australia

The Australian Commonwealth Constitution differs from its American counterpart in that it does not have an express "Bill of Rights."<sup>619</sup> Though recent decisions of the High Court have laid "the foundation for a judicially constructed Bill of Rights,"<sup>620</sup> the protection of individual freedoms from government regulation is not as great in Australia as it is in the United States.<sup>621</sup> For example, freedom of expression receives less protection in Australia than it does in the United States. In Australia, free speech extends only to "freedom for Australian citizens to communicate on political and economic matters."<sup>622</sup> A mega-media company, therefore, is not likely to be able to mount a significant challenge to the validity of Australian anti-siphoning legislation on freedom of expression grounds.

The Commonwealth Constitution contains "five 'individual rights'

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land use context the "most recent tests for confiscatory regulations—essential nexus and rough proportionality," which provide increased protection of property rights); Mitten & Burton, *supra* note 9, at 137 (noting that holders of personal property rights receive less takings protection than holders of real property rights). See also John D. Echeverria, *Revving the Engines in Neutral: City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 29 ENVTL. L. REP. 10682, 10682 (1999) (noting that the Supreme Court has limited the "rough proportionality" test to the exactions context).

618. Garnett, *supra* note 615, at 128 (noting that the Supreme Court has upheld regulated rates for common carrier rates that only provide a "meager return" (quoting Fed'l Power Comm'n v. Hope Natural Gas, 320 U.S. 591, 605 (1943))). See also Andrus v. Allard, 444 U.S. 51, 66 (1979) ("[L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.").

619. PETER HANKS, CONSTITUTIONAL LAW IN AUSTRALIA 495 (2d ed. 1996) (discussing rights and freedoms in Australian constitutional law).

620. *Id.* at 545.

621. *Id.* at 495 (noting that the Australian Commonwealth Constitution provides less protection for fundamental freedoms than the American Constitution).

622. *Id.* at 545.

clauses.”<sup>623</sup> One of these is contained in section 51(xxxi) which “authorises the Commonwealth Parliament to make laws with respect to . . . ‘[t]he acquisition of property on just terms from any State or person in respect of which the Parliament has power to make laws . . . .’”<sup>624</sup> Though it grants “the Commonwealth Parliament with a legislative power of acquiring property,” section 51(xxxi) also “provides the individual . . . affected with a protection against governmental interferences with his proprietary rights without just recompense . . . .”<sup>625</sup> The Australian “High Court has taken the view” that section 51(xxxi) generally applies to “any Commonwealth law for the acquisition of property.”<sup>626</sup>

Section 51(xxxi) provides a mega-media company with a possible means to challenge the application of the Australian anti-siphoning laws to a media league.<sup>627</sup> Whether the anti-siphoning rules constitute an acquisition of a professional sports league’s transmission rights on unjust terms is an issue of first impression in that country. The anti-hoarding legislation states that the amendments have “no effect to the extent” that they contravene section 51(xxxi) by authorizing the acquisition of property other than on just terms.<sup>628</sup> Though recognizing the possibility of an infringement of section 51(xxxi), the commentary to the anti-hoarding amendments concludes that resolution of this issue is for the courts.<sup>629</sup>

A mega-media company would appear to have a viable claim under section 51(xxxi) to the anti-siphoning laws. “The concept of ‘property’ under [§] 51(31) is very broad.”<sup>630</sup> The section “extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action.”<sup>631</sup> The transmission rights to a

623. *Id.* at 496.

624. *Id.* at 499 (quoting AUSTL. CONST. ch. I, pt. V, § 51(xxxi)).

625. *Bank of New South Wales v. Commonwealth*, (1948) 76 C.L.R. 1, 349-50 (Dixon, J.) (Austl.).

626. HANKS, *supra* note 619, at 500. Exceptions to the reach of § 51(xxxi) exist, though they are not relevant to the media league context. *Id.*

627. Media Release, Senator Richard Alston, Rugby League To Remain on Free to Air Television (announcing that the anti-siphoning list includes the matches of News Corporation’s Super League as well as any future league resulting from the merger of Super League and the ARL), available at <http://www.dcit.gov.au/nsapi-graphics> (last visited July 19, 1999).

628. Broadcasting Services Amendment Bill (No.1), 1999, § 146F(5) (Austl.).

629. Bills Digest No. 6 1998-99, Broadcasting Services Amendment Bill 1998, available at <http://www.aph.gov.au/library/pubs/bd/1998-99/99bd006.htm> (last visited Mar. 7, 2000).

630. Denis O’Brien, *The One That Almost Got Away—The Constitutional Guarantee of Just Terms*, 5 PUB. L. REV. 7, 7 (1994).

631. *Minister of State for the Army v. Dalziel*, (1944) 68 C.L.R. 261 (Starke, J.) (Austl.), 1944

mega-media company's sporting event in any medium are "property" under this interpretation of the term.<sup>632</sup>

"[T]he acquisition of property referred to in [§] 51(xxxi) need not be an acquisition by the Commonwealth Government—that is, if a law of the Commonwealth is a law with respect to the acquisition of property for a Commonwealth purpose, then the law is subject to the 'just terms' requirement . . . ."<sup>633</sup> "It is immaterial whether the acquisition is to be made by the Commonwealth or by some body authorised to acquire the property by the Commonwealth . . . ."<sup>634</sup> For an acquisition to occur, an interest in property must pass from the property holder to the Commonwealth or another person.<sup>635</sup>

Applying these principles to the media league context, a mega-media company which is not a commercial broadcaster may argue that the anti-siphoning laws force it to pass the free-to-air television rights to the matches of its professional sports league to commercial broadcasters. The anti-siphoning regulations serve a Commonwealth purpose.<sup>636</sup> The anti-siphoning rules effectively require a mega-media company to transfer its free-to-air television rights to the commercial broadcaster that offers the highest bid. The anti-siphoning laws implicitly prohibit a mega-media company from selling or using its pay television rights to a sporting event until after it sells the free-to-air rights.<sup>637</sup>

The "central limiting factor" in section 51(xxxi) is the requirement of "just terms."<sup>638</sup>

In determining the issue of just terms, the Court does not attempt a balancing of the interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by the government . . . are not required to sacrifice their

WL 26029, at \*21. See also *Georgiadis v. Australian & Overseas Telecomms. Corp.*, (1994) 179 C.L.R. 297 (Austl.), 1994 WL 1725763, at \*3 (affirming that choses in action are "property" for purposes of § 51(xxxi)).

632. Rubenstein, *supra* note 368, at 3 (noting that the broadcasting rights to a sporting event are "purely contractual" under Australia law), available at <http://www.gtlaw.com.au/templates/publications/default.jsp?pubid=119>.

633. HANKS, *supra* note 619, at 505.

634. *Id.* (quoting *P. J. Magennis Pty. Ltd. v. Commonwealth*, (1949) 80 C.L.R. 382, 423 (Williams, J.) (Austl.)).

635. *Id.* at 508 (citing *Georgiadis*, 179 C.L.R. 297).

636. BROADCASTING REPORT, *supra* note 580, at 234.

637. *Id.*

638. HANKS, *supra* note 619, at 511.

property for less than its worth. Unless it be shown that what is gained is full compensation for what is lost, the terms cannot be found to be just.<sup>639</sup>

The generally accepted principle is that “the terms provided should reflect the property’s market value—‘the price which a reasonably willing vendor would have been prepared to accept and a reasonably willing purchaser would have been prepared to pay for the property at the date of acquisition.’”<sup>640</sup> “However, the property’s particular value to the former owner must be taken into account.”<sup>641</sup> The terms of the acquisition may need to include compensation for loss that flows from the transfer of property from the original owner (*e.g.*, loss of goodwill).<sup>642</sup>

Satisfying the “just terms” element of section 51(xxxi) requires a mega-media company to show that the anti-siphoning laws reduce the return it receives from the transmission rights to its media league. The government is likely to argue that the property acquired under the anti-siphoning laws is the free-to-air transmission rights to the listed sporting event. A mega-media company arguably receives market value for these rights from the commercial broadcaster that submits the best offer to buy them. This argument is not persuasive. A showing by a mega-media company that a greater return is possible from showing media league contests exclusively on pay television than from adhering to the anti-siphoning laws supports a claim that it sacrifices its property for less than its worth. Also, any differential between the return from maintaining exclusive transmission rights and selling free-to-air television rights and retaining pay television rights is another possible measure of the loss a mega-media company suffers from the anti-siphoning laws.<sup>643</sup>

Thus, a just terms claim provides a mega-media company with a stronger challenge to the anti-siphoning rules in Australia than a regulatory takings claim does against anti-siphoning regulation in the United States.

### *B. Players’ Challenges to Restrictive Employment Conditions in a Media League*

Controlling costs is a concern for a mega-media company operating a

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639. *Georgiadis*, 1994 WL 172563, at \*10.

640. HANKS, *supra* note 619, at 512 (quoting *Nelungaloo v. Commonwealth*, (1948) 75 C.L.R. 495, 507 (Williams, J.) (Austl.)).

641. *Id.*

642. *Id.*

643. Sutton, *supra* note 603, at 1 (querying whether the owner of a listed sporting event may seek from the government any loss profits caused by the Australian anti-siphoning laws).



media league. Since personnel expenses account for a significant percentage of a media league's operating budget, restricting players' salaries is a means for a mega-media company to reduce expenditures. A mega-media company may also want to restrict the movement of players between club subsidiaries. Restrictions of these types enhance competitive balance and stability in a media league.

Traditional leagues in the United States and Australia, motivated by budgetary and competitive balance concerns, have attempted to implement unilaterally restrictive employment conditions on players' salaries and mobility. Players in both countries, however, have successfully challenged unfavorable employment restrictions.<sup>644</sup> Because of a media league's single economic entity structure,<sup>645</sup> a mega-media company is likely to face fewer and less effective challenges from players to its restrictive employment terms than traditional leagues encounter. Given the benefits of a single economic entity structure for a professional sports league, a mega-media company is likely to be wary of taking any action that may threaten loss of single entity status. The current litigation between MLS, the premium professional soccer league in the United States, and its players regarding the alleged single entity structure of the league demonstrates the risk to single entity status by decentralizing control over club affairs.

1. Single economic entity structure of a media league limits the legal bases in the United States and Australia upon which players can challenge restrictive employment conditions

*a. United States*

In the United States, section 1 of the Sherman Act is the legal basis upon which players commonly challenge restrictive employment provisions (*e.g.*, player drafts, reserve clauses) in traditional leagues.<sup>646</sup> Section 1 makes illegal unreasonable restraints of trade between at least two independent

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644. Krause, *supra* note 452, at 179 n.22 (listing cases in which American courts have invalidated restrictions on players' mobility in traditional professional sports leagues); Warren Pengilly, *Sporting Drafts and Restraint of Trade*, 10 QUEENSLAND UNIV. TECH. L.J. 89, 98 (1994) (noting the "very low success" traditional professional sports leagues have had in defending restrictive employment terms before Australian courts).

645. See *supra* notes 452-462 and accompanying text (discussing single economic entity structure of a media league).

646. See, *e.g.*, *Smith*, 593 F.2d 1173 (attacking the NFL draft under § 1); *Mackey*, 543 F.2d 606 (challenging under § 1 the NFL's rule requiring a club acquiring a free agent to compensate the player's former club).

economic entities.<sup>647</sup> Courts use “two ‘complementary categories of antitrust analysis’” to determine whether a restraint is unreasonable.<sup>648</sup> Concerted action that has “no competitive benefits” (e.g., price fixing, group boycotts) is unreasonable, and illegal per se.<sup>649</sup> Agreements not falling within a per se category are analyzed under a rule of reason test. A restraint is illegal under the rule of reason if its anti-competitive effects outweigh its pro-competitive benefits.<sup>650</sup>

The restrictive employment conditions in a traditional league fall under section 1 because separate clubs—competitors for the employ of players—agree to them. Courts generally analyze traditional leagues’ restrictive employment terms under the rule of reason, rather than finding them per se illegal.<sup>651</sup> Courts typically invalidate under section 1 the employment restraints of traditional leagues because their detrimental effects on the ability of players to market their services to the individual clubs in the league are not outweighed by pro-competitive justifications.<sup>652</sup> In particular, courts find unpersuasive the leagues’ arguments that restrictions on players’ salaries and mobility promote competitive balance between the individual clubs.<sup>653</sup>

Players cannot use section 1 of the Sherman Act to challenge restrictive employment practices in a media league.<sup>654</sup> A parent corporation and its wholly owned subsidiary are a single entity for antitrust purposes.<sup>655</sup> The concerted action requirement for section 1 applicability is missing in the media league context.

Though free from section 1 attack, a mega-media company may face challenges to its employment policies under section 2 of the Sherman Act.<sup>656</sup>

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647. 15 U.S.C. § 1 (1994); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (noting the limited reach of § 1 of the Sherman Act); Mathias, *supra* note 462, at 206 (noting the concerted action requirement of § 1).

648. Mathias, *supra* note 462, at 206 (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978)).

649. *Id.* (citing *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 334 (1982)).

650. *Id.*

651. *See, e.g., Mackey*, 543 F.2d at 607 (applying the rule of reason to the NFL’s “Rozelle Rule”).

652. *See infra* note 774.

653. Dabscheck, *supra* note 474, at 602-03; *Smith*, 593 F.2d at 1186 (rejecting NFL’s competitive balance justifications for its player draft).

654. Mathias, *supra* note 462, at 219-20 (noting that single entity professional sports leagues are not subject to suit under § 1).

655. *Copperweld Corp.*, 467 U.S. at 776 (concluding § 1 does not apply to “the coordinated [behavior] of a parent and its wholly owned subsidiary”).

656. Mathias, *supra* note 462, at 229 (noting that players may allege a § 2 claim against a single entity professional sports league).

Section 2 provides that “[e]very person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony.”<sup>657</sup> Players may claim that a mega-media company, by its restrictive employment terms, is abusing its monopoly power in the labor market. Winning such a section 2 claim against a mega-media company may be difficult.<sup>658</sup> To succeed, players have to show that the mega-media company has monopoly power in the relevant labor market, and that it uses the employment practice at issue to maintain willfully that power.<sup>659</sup> Given the large number of professional sports leagues in the world today in the various sports, a mega-media company is not likely to have monopoly power in the market for players. A player subject to unfavorable labor conditions in a media league may seek employment in another league.<sup>660</sup> Where a mega-media company, however, creates a media league in a sport for which there are no other professional leagues, players have a stronger section 2 claim.

By not being subject to section 1 attack, a mega-media company has the ability to impose employment conditions more onerous than those currently present in traditional leagues. Since players’ associations are well organized in the United States, a mega-media company is likely to have to enter into a collective bargaining agreement with the players. A significant ploy players’ unions use in negotiations with traditional leagues is to threaten a lawsuit under section 1.<sup>661</sup> A players’ association cannot wield this weapon when dealing with a media league. Rather, a players’ union must resort to labor law protections and threats of labor unrest to exact concessions from a mega-media company.

#### *b. Australia*

In Australia, the restraint of trade doctrine is the legal basis used to

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657. 15 U.S.C. § 2 (1994).

658. Mathias, *supra* note 462, at 229 (noting that players are less likely to win a § 2 claim against a professional sports league than a § 1 claim).

659. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1996) (stating the requirements for a claim under § 2 of the Sherman Act).

660. Mathias, *supra* note 462, at 230 (arguing that MLS, the American professional soccer league, does not have monopoly power in the labor soccer market because of the presence of other professional soccer leagues in the world).

661. *Id.* at 208, 237 (noting that threat of a § 1 lawsuit has increased the bargaining power of players’ associations vis-à-vis traditional professional sports leagues). After the Supreme Court’s decision in *Brown v. Pro Football, Inc.*, players have to vote to decertify their union before they can bring an antitrust suit to challenge the restrictive employment practices in a traditional professional sports league. *Brown*, 518 U.S. at 250; Mathias, *supra* note 462, at 220 n.96 (discussing *Brown*).

challenge restrictive employment practices of traditional leagues.<sup>662</sup> Under the restraint of trade doctrine, "conduct that is in restraint of trade is *prima facie* void unless it is reasonable, reasonableness being measured by reference to the interests of both the parties involved and the public in general."<sup>663</sup> "A contract is in restraint when it requires the restrained party to forfeit some choice regarding their employment."<sup>664</sup> "Once the restraint is shown to exist . . . the restraining party . . . [must] show that the restraint is reasonable in the interests of the parties."<sup>665</sup> A restraint is reasonable in the interest of the parties, if it "afford[s] no more than adequate protection to the restraining party," taking into account "the legitimate business interests of the restraining party" and "the interests of the restrained party to choose their employer and conditions they work under."<sup>666</sup> If the restraining party carries its obligation, then the onus is on the restrained party to prove that the restraint is unreasonable in the public interest.<sup>667</sup> The court determines whether the restraint offends public policy, though "it is a very rare situation that a restraint that is reasonable in the interests of the parties is unreasonable in the public interest."<sup>668</sup>

Australian courts routinely invalidate under the restraint of trade doctrine employment restrictions traditional leagues impose upon players.<sup>669</sup> Though they differ in detail, labor market controls of Australian leagues are similar to those in American leagues in that they depress players' salaries and reduce the off-field competition between the individual clubs for the employ of players. Australian leagues, like their American counterparts, argue that these restrictions are needed to achieve competitive balance among the clubs.<sup>670</sup> Though they recognize parity among clubs as a legitimate concern, Australian courts generally conclude that traditional leagues' employment practices such as player drafts and transfer fee systems are unreasonable because they are more restrictive than necessary to protect the leagues' business interests.<sup>671</sup>

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662. Davidson, *supra* note 65, at 190-92 (discussing players' challenges under the restraint of trade doctrine against Australian traditional professional sports leagues).

663. *Id.* at 189.

664. *Id.*

665. *Id.* at 189-90.

666. *Id.* at 190.

667. *Id.*

668. *Id.*

669. *Id.* at 172 (listing examples of the restrictive employment conditions Australian courts have invalidated under the restraint of trade doctrine).

670. *Id.* at 190 (noting arguments of Australian professional sports leagues).

671. *Id.* at 191 (noting the conclusions of Australian courts reviewing restrictive employment provisions in Australian leagues); Dabscheck, *supra* note 474, at 603 (noting that Australian courts "have overwhelmingly struck" down labor market controls in traditional professional sports leagues under the restraint of trade doctrine).

Australian courts are very solicitous of an employee's "right to choose between prospective employers"<sup>672</sup> and refuse to permit an infringement of a player's freedom in employment given the paucity of evidence supporting the utility of player restraints.<sup>673</sup>

The restraint of trade doctrine is likely not to be available to players to attack salary and mobility restrictions in a media league.<sup>674</sup> A mega-media company's allocation of players among its club subsidiaries does not constitute an actionable restraint of trade.<sup>675</sup> "An intra-enterprise restraint is not a restraint that [an Australian court] will look at, nor one that could be considered as unreasonable, as it is usual for a firm to be able to allocate its employees among its departments as it desires without interference of restraint of trade laws."<sup>676</sup>

Players in either a traditional or media league cannot resort to the Australian Trade Practices Act (TPA) because the legislation expressly excludes from its coverage "performance of work under a contract of service" (*i.e.*, an employment contract).<sup>677</sup> A well-settled principle of Australian law is that an employee-employer relationship exists between a player and an individual club in a traditional league.<sup>678</sup> A mega-media company is likely to structure its contracts with players so as to qualify for the "contract of service" exception in the TPA. Even if a mega-media company creates a Australian media league in a sport for which no other professional sports league exists, a player cannot assert a misuse of market power claim under section 46 of the TPA to challenge an unfavorable condition of employment.<sup>679</sup> In Australia,

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672. *Adamson v. New South Wales Rugby Football League*, (1991) 31 F.C.R. 242, 267 (Wilcox, J.) (Full Fed. Ct. Austl.), 1991 WL 1120857, at \*30.

673. Pengilley, *supra* note 644, at 98 (noting that in cases involving player restraints courts have held "in favour of individual freedom").

674. Interview with Braham Dabscheck, Associate Professor, School of Industrial Relations, Univ. New South Wales (Sydney, Australia Nov. 9, 1999) [hereinafter Dabscheck Interview] (stating that players would have difficulty using the restraint of trade doctrine to challenge employment practices in a single entity professional sports league).

675. Davidson, *supra* note 65, at 173 (noting that the divisions in a single firm are incapable of imposing a restraint among themselves cognizant under the Australian restraint of trade doctrine).

676. *Id.* at 192.

677. Trade Practices Act, 1974, § 4(1) (Austl.). See also *Adamson*, 1991 WL 1120857, at \*21-\*24 (concluding that a contract between a club in a traditional professional sports league and a player is a "contract of service" and, ergo, is outside the Trade Practices Act); Davidson, *supra* note 65, at 193-94 (discussing the exclusion of players' contracts from the Trade Practices Act).

678. Opie & Smith, *supra* note 477, at 318 (noting that the Australian High Court has "put the [employee] status of professional team athletes beyond doubt").

679. Maeve McDonagh, *Restrictive Provisions in Player Agreements*, 4 AUSTL. J. LABOUR L. 126, 144-47 (1991) (discussing the prospects of a player using the Trade Practices Act to challenge employment restrictions).

players must rely heavily on labor law principles and collective bargaining to contest employment rules in a media league.<sup>680</sup>

A unique Australian legal basis upon which a player may challenge a restrictive employment term in a contract with a mega-media company is the unfair contract provisions of the New South Wales Industrial Relations Act.<sup>681</sup> This statute defines as “unfair” any contract “that is unfair, harsh, or unconscionable, or [ ] that is against the public interest . . . .”<sup>682</sup> Upon application of any party to a contract,<sup>683</sup> the Industrial Commission, after finding the contract to be unfair, may declare the contract “wholly or partly void.”<sup>684</sup> “The Commission may find that [the contract] was an unfair contract at the time it was entered into or that it subsequently became an unfair contract because of any conduct of the parties, any variation of the contract or any other reason.”<sup>685</sup>

A player may use this legal ground to obtain relief from the negative effects of a particular action of a club or league.<sup>686</sup> For example, during the Super League saga, the ARL established a policy not to select for international representative matches players who had signed contracts to play in Super League.<sup>687</sup> Affected players petitioned the New South Wales Industrial Commission to set aside the ARL’s decision under the unfair contract provisions. The Commission held in favor of the players because the ARL’s policy was an unreasonable restraint of trade and unfair.<sup>688</sup> The Commission ordered the ARL to consider Super League players for representative selection.

The extent to which the unfair contract provisions can be used to combat restrictive employment terms in a media league is limited. First, the provisions apply only on a case-by-case basis to examine the specific contract

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680. Dabscheck Interview, *supra* note 674 (noting that labor law is the principal recourse for players in dealing with single entity professional sports leagues).

681. Industrial Relations Act, 1996, §§ 105-09A (N.S.W. ACTS).

682. *Id.* § 105(a)-(b).

683. *Id.* § 108(a) (listing “any party to the contract” as a person who may apply for an order from the Commission).

684. *Id.* § 106(1).

685. *Id.* § 106(2).

686. Opie & Smith, *supra* note 477, at 348-49 (discussing player’s use of unfair contract statute to challenge his dismissal from the team where club failed to provide notice of the contract’s terms in negotiations).

687. Daley v. New South Wales Rugby League Ltd., [1995] N.S.W.I.R.C. 183 (New South Wales Indust. Rel. Comm’n. Sept. 19, 1995) (AustLII.edu.au, Austl. Case Law).

688. *Id.*

between a particular player and his employer.<sup>689</sup> They provide no basis upon which to challenge a comprehensive employment scheme such as a player draft or salary cap. Second, the unfair contract laws are unique to New South Wales and are not present in any other Australian jurisdiction.<sup>690</sup> Only contracts between players and a mega-media company within the jurisdiction of the Industrial Relations Commission of New South Wales are subject to this statute.

2. Fragmented ownership of a media league may endanger its single entity structure: *Fraser v. Major League Soccer*

A mega-media company should not take any action that may preclude a media league from having single economic entity status. The lawsuit between Major League Soccer (MLS) and players in the league demonstrates the risks to single entity status by decentralizing control over individual clubs.

MLS is a limited-liability corporation.<sup>691</sup> MLS owns all the clubs in the league, but sells stock in the corporation.<sup>692</sup> Investors can purchase two types of stock. "Operator/investor" stock gives the purchaser the right to exercise substantial control over the operations of an individual club in the league.<sup>693</sup> For example, operator/investors "are responsible for hiring general managers, front-office personnel, coaches, the drafting and trading of players and local marketing."<sup>694</sup> Investors may purchase the right to operate more than one team.<sup>695</sup> Currently in MLS, one investor manages three clubs, while two other investors each operate two clubs apiece.<sup>696</sup> Operator/investors receive a "management fee," which is a percentage of a club's local revenues,<sup>697</sup> a dividend from any MLS operating profits, and may realize any gain from

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689. *Adamson*, 1991 WL 1120857, at \*26 (noting the limited applicability of § 275 of the Industrial Relations Act, an earlier version of the unfair contract provisions); Pengilley, *supra* note 644, at 112 (agreeing with the ruling in *Adamson*).

690. McDonagh, *supra* note 679, at 150 (noting that New South Wales' unfair contract laws are unique in Australia); Dabscheck Interview, *supra* note 674 (same).

691. Mathias, *supra* note 462, at 221.

692. *Id.* (discussing MLS' corporate structure).

693. Rob Atherton, Note, *Fraser v. Major League Soccer (MLS) The Future of the Single-Entity League and the International Transfer System*, 66 UMKC L. REV. 887, 899 (1998).

694. *Id.*

695. Mathias, *supra* note 462, at 222.

696. *Id.* at 222 n.108.

697. MLS Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment, *Fraser v. Major League Soccer*, No. 97-10342(GAO) (D. Mass. Jan. 26, 1998), reprinted in 549 PLI/PAT 729, 821 (1999) [hereinafter PLI].

selling their stock to outside buyers.<sup>698</sup> Purchasers of non-operator/investor stock are not involved in operating clubs and only receive a dividend from MLS profits.<sup>699</sup> "MLS retains all national television and merchandising revenues."<sup>700</sup>

Technically, MLS signs all players to employment contracts and assigns them to clubs.<sup>701</sup> The individual clubs, however, are involved in the employment process. Each club notifies MLS of players it wants for its roster. MLS then negotiates with the player, who will be assigned to the requesting club if an agreement is reached.<sup>702</sup> Each MLS player contract contains a reserve clause which "gives the league the unilateral right to renew the contract."<sup>703</sup> MLS imposes a standard salary cap for each club.<sup>704</sup>

In *Fraser v. Major League Soccer*,<sup>705</sup> the players allege that MLS' restrictive employment practices violate the antitrust laws. In particular, the plaintiffs claim that the league's player allocation system, reserve clause, and salary cap constitute an unreasonable restraint of trade under section 1 of the Sherman Act.<sup>706</sup> In making this claim, the plaintiffs argue that MLS is not a single economic entity because the operator/investors are independent economic actors. According to the plaintiffs, MLS's structure is a "sham" designed solely to allow the league to escape review under section 1.<sup>707</sup> The plaintiffs argue that the operator/investors in MLS are economically indistinguishable from the individual owners in a traditional American league.<sup>708</sup>

MLS defends on the grounds that it is a single economic entity incapable of violating section 1. MLS analogizes itself to corporations, such as General Motors, which are undoubtedly single entities for antitrust purposes though they sell different categories of shares.<sup>709</sup> To distinguish operator/investors

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698. Mathias, *supra* note 462, at 221.

699. Atherton, *supra* note 693, at 899.

700. Mathias, *supra* note 462, at 221.

701. *Id.* at 227.

702. *Id.*

703. *Id.* at 207.

704. Atherton, *supra* note 693, at 900.

705. 180 F.R.D. 178 (D. Mass. Jan. 28, 1998).

706. Memorandum of Law in Support of Class Plaintiffs' Motion for Partial Summary Judgment, *Fraser v. Major League Soccer*, No. 97-10342(GAO) (D. Mass. Jan. 2, 1998), *reprinted in* PLI, *supra* 697, at 737.

707. *Id.* at 738.

708. *Id.* at 749.

709. *Id.* at 1003 n.18 (publishing MLS' Reply Memorandum of Law in Further Support of its Motion for Partial Summary Judgment).



from franchise owners in a traditional league, MLS points to its control over all league revenues, whether generated locally or nationally, its extensive oversight of the clubs, and the commonality of interest among the operator/investors caused by their ability to manage multiple clubs.<sup>710</sup>

Though the trial court concluded that MLS is a single entity and granted summary judgment for the league on the players' section 1 claim,<sup>711</sup> the single entity debate in *Fraser* continues.<sup>712</sup> *Fraser* shows the potential for players to challenge a mega-media company on section 1 and restraint of trade grounds in the United States and Australia if outside investors assume substantial control over the club subsidiaries in a media league. Selling minority equity interests in the club subsidiaries to fans and investors is not likely to result in a media league losing single entity status since the parent mega-media company can still assert "full control" over the clubs' operations.<sup>713</sup> Until further guidance from *Fraser* or other developments in the law, the ability of a mega-media company to relinquish a majority interest in the club subsidiaries and maintain single entity status is uncertain.

*C. Acquisition of Playing Venues for a Media League: The Essential Facility Doctrine in the United States and Australia*

Securing access to playing venues is a necessary part of operating a media league. A mega-media company may have difficulty in obtaining access to a playing facility in locales where an established league, or an individual club of an established league, owns, or has an exclusive stadium lease agreement for, the only venue suitable for hosting a professional sports league contest. In such a situation, a mega-media company may have to resort to legal action under the essential facility doctrine to gain access to the venue. The success that a mega-media company may achieve with the essential facility doctrine is likely to vary between the United States and Australia since the doctrine is not identical in the two countries.

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710. *Id.* at 813-24 (producing MLS' Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment).

711. *Fraser v. Major League Soccer, L.L.C.*, 97 F. Supp. 2d 130, 142 (D. Mass. 2000).

712. Mathias, *supra* note 462, at 229 (concluding that MLS is a single entity); *but see* Atherton, *supra* note 693, at 911 (concluding that "MLS is not a single-entity").

713. *Copperweld*, 467 U.S. at 771-72 (noting that a parent corporation "may assert full control" of a subsidiary at any time).

## 1. United States

### a. Review of the essential facility doctrine

Though its origins trace back to 1912,<sup>714</sup> the term “essential facility doctrine” first appeared in American jurisprudence in 1977. In *Hecht v. Pro-Football, Inc.*,<sup>715</sup> the plaintiffs claimed that the defendant, owner of the Washington Redskins, a NFL franchise, violated the antitrust laws by refusing to waive an exclusivity provision in its lease with the District of Columbia Armory Board, the operator of RFK Stadium.<sup>716</sup> According to the plaintiffs, the defendant’s refusal to renegotiate with the Armory Board prevented their obtaining access to the stadium. As a result, the American Football League, a rival league to the NFL at that time, rejected the plaintiffs’ application for a franchise in the Washington D.C. area.<sup>717</sup>

The court set forth the theory behind the plaintiffs’ claims as follows:

The essential facility doctrine, also called the “bottleneck principle,” states that “where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility.” . . . To be “essential” a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants. Necessarily, this principle must be carefully delimited: the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant’s ability to serve its customers adequately.<sup>718</sup>

Since the plaintiffs had presented evidence that RFK Stadium was the only suitable stadium for professional football in the Washington D.C. metropolitan area and that joint use of the stadium with the Redskins was feasible, the court

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714. Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 842 (1989) (“The essential facilities notion is usually traced to the *Terminal Railroad* combination case.”); *but see* Werden, *supra* note 391, at 441-42 (“Which cases are essential facility cases is subject to dispute. *Terminal Railroad* and three other cases could each be considered the seminal essential facility case: *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.*, *United States v. Otter Tail Power Co.*, and *Hecht v. Pro-Football, Inc.*” *Id.* (citations omitted)).

715. 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

716. *Id.* at 985-86.

717. *Id.*

718. *Id.* at 992-93 (footnotes and citations omitted).

held that the trial court committed prejudicial error in not giving the plaintiffs' jury instruction on section 1 of the Sherman Act based on the essential facility doctrine.<sup>719</sup> Moreover, the court believed that "the essential facility doctrine would also support an allegation that the Redskins' refusal to waive the restrictive covenant constituted illegal monopolization under §2."<sup>720</sup> The court did not grant a remedy based on the plaintiffs' section 2 claims since "Hecht . . . did not request an instruction to this effect."<sup>721</sup> The court remanded for a new trial on plaintiffs' section 1 claims.<sup>722</sup>

The evil that the essential facility doctrine seeks to prevent is the suppression of "horizontal competition that might be of benefit to consumers—competition that could survive if all firms had access to the essential facility."<sup>723</sup> Based on this rationale, to prove an antitrust violation under the essential facility doctrine in the United States, a plaintiff must establish (1) control of an essential facility by a monopolist; (2) that a competitor cannot practically or reasonably duplicate the essential facility; (3) that denial of the use of the facility is to a competitor; and (4) that providing access to the facility is feasible.<sup>724</sup> The plaintiff may charge breach of section 1 or section 2 of the Sherman Act depending on the number of defendants allegedly blocking access to the facility.<sup>725</sup>

*b. Application of the American essential facility doctrine in the media league context*

In a media league context, an essential facility doctrine issue may arise if

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719. *Id.* at 993.

720. *Hecht*, 570 F.2d at 993 n.44.

721. *Id.*

722. *Id.* at 998-99.

723. *Fishman v. Wirtz*, 807 F.2d 520, 571 (7th Cir. 1986) (Easterbrook, J., dissenting).

724. *MCI Communications Corp., v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983) (delineating requirements to prove an antitrust violation under the essential facility doctrine), *cert. denied*, 464 U.S. 891 (1983); Werden, *supra* note 391, at 445 ("The most significant essential facility case is . . . *MCI Communications v. American Telephone & Telegraph Co.*"); *id.* at 452-58 (expounding on the *MCI* elements); Warren Pengilley, *Hilmer and "Essential Facilities"*, 17 U.N.S.W. L.J. 1, 21 n.74 (1994) (listing *MCI* criteria).

725. *Hecht*, 570 F.2d at 985-86 (noting plaintiffs' § 1 claim against Pro Football, Inc., and the Armory Board, and § 2 claim against Pro Football, Inc.). "The essential facility concept, applied to a single firm, must heed the conduct requirement—not just market power—necessary to constitute monopolization under Section 2 of the Sherman Act. The formula the Supreme Court has most recently used is the 'willful acquisition or maintenance' of monopoly power." Areeda, *supra* note 714, at 845 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). By definition, a violation of section 1 requires two or more firms acting in concert to restrain trade. See also *Copperweld Corp.*, 467 U.S. at 768 (noting the joint action requirement of § 1 of the Sherman Act).

an established league or one of its clubs denies a mega-media company access to a playing venue.<sup>726</sup> The established league's or club's control over the stadium may arise from its ownership of the facility or an exclusive lease agreement with the stadium owner.<sup>727</sup> To gain access to this facility using the essential facility doctrine in the United States, a mega-media company has to file a lawsuit against the established league or club alleging a violation of the Sherman Act. Such a suit is likely to raise a number of complex issues including whether the defendant has monopoly power over the facility, whether the facility is essential,<sup>728</sup> and whether the defendant, by denying a mega-media company access to the facility, is using its monopoly power to suppress competition in a relevant market.<sup>729</sup> Resolution of these issues depends on the facts out of which the lawsuit arises.

To support its position, a mega-media company can turn to precedent such as *Hecht* and *Fishman v. Wirtz*. In *Fishman*, a prospective purchaser of the Chicago Bulls, a NBA club, sought to negotiate a lease for use of Chicago Stadium, the only venue in the city suitable for hosting professional basketball games. The owner of Chicago Stadium, also a bidder for the Chicago NBA franchise, refused to negotiate a lease agreement in order to damage his rival's bid for the basketball club. The Court of Appeals, applying the essential facility doctrine, held that the owner's conduct was a violation of the Sherman Act.<sup>730</sup>

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726. Noll, *supra* note 463, at 380 ("A final institutional mechanism that has been deployed to forestall entry [of rival leagues] is the exclusive rental agreement to obtain a stadium.").

727. Werden, *supra* note 391, at 455-56 ("The MCI test uses the term control presumably to include within the essential facility doctrine situations in which the essential facility is not owned by the monopolist but is controlled by exercising particular contract rights.").

728. Donald B. Robertson, *Government Business Enterprises and Access to Essential Facilities*, 2 COMPETITION & CONSUMER L.J. 98, 112 (1994) ("In *Hecht*, the court identified two characteristics of an essential facility: (1) something to which a competitor or a potential competitor must have access in order to compete in the relevant market. Denial constitutes a 'severe handicap'; (2) something which cannot be duplicated; it is not economically feasible to do so." (quoting *Hecht*, 570 F.2d at 992)). "There must be some respect in which the facility is vital to the competitive viability of the person seeking access." *Id.* See also *Fishman*, 807 F.2d at 539 (defining an essential facility as one "that cannot reasonably be duplicated and to which access is necessary if one wished to compete").

729. William Blumenthal, *Three Vexing Issues Under the Essential Facilities Doctrine: ATM Networks as Illustration*, 58 ANTITRUST L. J. 855, 860 (1989) (discussing the analysis of the essential facility doctrine); Ravi P. Kewalram, *The Essential Facilities Doctrine and Section 46 of the Trade Practices Act: Fine-tuning the Hilmer Report on National Competition Policy*, 2 TRADE PRACTICES L.J. 188, 196 (1994) (noting that the monopolist inquiry is separate from the one concerning whether the facility is essential).

730. *Fishman*, 807 F.2d at 539-41 (discussing plaintiffs' §§ 1 and 2 claims based on the essential facility doctrine). But see Werden, *supra* note 391, at 448 (noting line of authority refuting *Hecht*).

## 2. Australia

### *a. Review of the essential facility doctrine*

Despite precedent suggesting otherwise,<sup>731</sup> the essential facility doctrine is a part of the Australian legal landscape following Parliament's enactment of an administrative access regime for national facilities in 1995.<sup>732</sup> Though its theoretical basis<sup>733</sup> and access criteria<sup>734</sup> are modeled after the American essential facility doctrine, the Australian legislation differs both substantively and procedurally from the American system of forced access to facilities.

Unlike in the United States, where generally a court is the legal body that orders access as a remedy, the Australian statute establishes a regime under which a government minister ultimately declares, at the conclusion of an administrative proceeding, whether an applicant is entitled to access.<sup>735</sup> In Australia:

There are three ways in which an applicant may be provided with access to essential services: (1) ministerial declaration after recommendation by the National Competition Council (NCC); (2) a service provider giving an undertaking to the Australian Competition and Consumer Commission (ACCC); and (3) an alternative, effective access regime established by a State or Territory.<sup>736</sup>

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731. Kewalram, *supra* note 729, at 205 (commenting that it was "not entirely clear" whether the essential facility doctrine was incorporated in Australian law); Pengilley, *supra* note 724, at 3 (noting that "Australian courts have shown a 'strange reluctance' to embrace" the American essential facility doctrine); Robertson, *supra* note 719, at 114 ("On the current authorities in Australia there is no 'doctrine' requiring the owner of an essential facility to grant access to that facility.").

732. The Competition Policy Reform Act, 1995 (Austl.); Trade Practices Act, 1974, pt. IIIA, § 44 (Austl.).

733. Kewalram, *supra* note 729, at 189.

In any given industry, an 'essential facility' is a unique productive resource which cannot be practically recreated but is vital for competition in that industry. Usually, this is because the facility is a link in the productive chain so that 'upstream' or 'downstream' producers cannot fulfill their role without access to that facility.

*Id.* See also *id.* at 206 ("[T]he main aim of the [essential facilities] doctrine . . . has been to protect consumers generally via protecting the competitive process.").

734. Warren Pengilley, *The National Competition Policy Draft Legislative Package: The Proposed Access Regime*, 2 COMPETITION & CONSUMER L.J. 244, 247-48 (1995) (noting that the proposed legislation adopted the American criteria, but for the national significance requirement, for determining whether a facility is essential and whether access should be granted).

735. Alsiter Abadee, *The Essential Facilities Doctrine and the National Access Regime: A Residual Role for Section 46 of the Trade Practices Act?*, 5 TRADE PRACTICES L.J. 27, 38 (1997) (writing on the Australian administrative access regime).

736. *Id.* at 38-39.

Though “time-consuming and complicated,” the first option is the “avenue” of choice for most applicants.<sup>737</sup>

In addition to the basic essential facility criteria found in American law,<sup>738</sup> an applicant has to prove other requirements for the NCC and a government minister to recommend and declare access. In particular, an applicant must show:

- access (or increased access) would promote competition in a market (other than the market for the service);
- it would be uneconomical for anyone to develop another facility to provide the service;
- the facility is of national significance, having regard to its size, the importance of the facility to constitutional trade and commerce, or its importance to the national economy;
- that access to the service can be provided without undue risk to human health or safety;
- that access to the service is not already the subject of an effective access regime; and
- that access (or increased access) would not be contrary to the public interest.<sup>739</sup>

A minister’s declaration of access only provides the applicant “a right to *negotiate* terms of access in good faith,” not an “automatic right to access.”<sup>740</sup> If the “parties cannot agree on access or its terms, the dispute may be referred to private arbitration or notified to the ACCC.”<sup>741</sup> An applicant may appeal a minister’s determination to the ACCC.<sup>742</sup> The ACCC, in its access determination, must consider a number of factors relating to “existing rights and ownership of [the] facility” in addition to the aforementioned criteria.<sup>743</sup>

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737. *Id.* at 39 (describing the “three-step procedure” applicants must perform under the first option).

738. *See supra* note 724 and accompanying text (listing basic elements of the essential facility doctrine).

739. Abadee, *supra* note 735, at 39. *See also* Trade Practices Act, 1974, pt. IIIA, §§ 44G(2), 44H(4) (Austl.).

740. Abadee, *supra* note 735, at 39.

741. *Id.*

742. *Id.*

743. *Id.* Only the essential elements of the highly detailed administrative process are given in the text. *See also* Pengilly, *supra* note 734, at 271-79 (using flowcharts to explain the legislation, eventually enacted, proposing the administrative access regime).

"Further appeals on questions of law can . . . be taken to the Federal Court."<sup>744</sup>

*b. Application of the Australian essential facility doctrine to the media league context*

The use of an administrative, rather than a judicial, process to determine access issues is not likely to have a tremendous effect on a mega-media company's efforts to secure playing facilities in Australia relative to the United States. The active role of a government minister in the Australian procedure, however, increases the political nature of the access determination in that country compared to the United States. This feature of the Australian access regime may benefit a mega-media company given its ability to voice its position in the public forum.

Of greater importance to a mega-media company than the procedural differences between the American and Australian access regimes is the additional substantive criteria the Australian statute imposes to gain access, most notably the national significance requirement. Though perhaps included in the legislation "to avoid the situation in the [United States] where sports stadiums and convention centres have been declared essential facilities," the national significance requirement may not fully achieve this objective.<sup>745</sup> Certain sports venues in Australia (e.g., Melbourne Cricket Ground, Stadium Australia) are arguably of national significance given their historical and current roles in Australian sport, and their growing significance to Australia's economy, especially given Sydney's hosting of the 2000 Summer Olympic Games.<sup>746</sup>

The national significance requirement poses a more pressing problem where a mega-media company desires access to a small regional facility controlled by an uncooperative party. In fact, negotiating access to the only suitable venue in a non-capital Australian city may be quite difficult if an individual club of an established league has a strong following in the area and exclusive rights to use the facility.<sup>747</sup> In such a situation, a mega-media

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744. Lynden Griggs, *Access to Essential Facilities*, 71 LAW INST. J. 40, 40 (May 1997).

745. *Id.* at 42 (citing sources). See also Kewalram, *supra* note 729, at 205 (suggesting that the drafters included the national significance requirement because they only wanted to force parties to deal when it was in the national interest to do so).

746. Griggs, *supra* note 744, at 42-43 (arguing that the Melbourne Cricket Ground and Stadium Australia meet the national significance requirement); but see Pengilley, *supra* note 724, at 17 n.55 ("[I]t is unlikely that any sporting stadiums—at least in Australian capital cities—would be likely to be held to be an 'essential facility' even if the doctrine were to apply here. The greater range of facilities available in Australian capital cities would, of itself, be enough to make the doctrine inapplicable.").

747. COLMAN, *supra* note 5, at 189 (describing News Corporation's struggle during the Super

company may find Part IIIA of the TPA to be of little use. Indeed, that the administrative access regime by definition does not apply to local geographic markets is one of the primary criticisms of the legislation.<sup>748</sup>

Surprisingly, the NCC's first decision under the new legislation interpreted "national" very broadly. In that case, the Council held that certain loading bays and hard stands at Sydney and Melbourne International Airports were essential facilities to which the government owner may not deny access, though numerous private companies had duplicated them.<sup>749</sup> These facilities were not of the type that the drafters of the legislation deemed of national significance.<sup>750</sup> Under this precedent, the scope of the administrative access regime is more expansive than its literal limits. This construction of the statute greatly strengthens the argument that all sport facilities, and especially the major Australian venues, fall under Part IIIA. However, given the incongruence between the statute's terms and legislative history with the NCC's initial decision, a mega-media company cannot rely too heavily upon Part IIIA to provide access to local playing facilities.

Because of the gap between the administrative access regime of Part IIIA and the competition law provisions of Part IV of the Trade Practices Act,<sup>751</sup> a mega-media company in Australia may also be able to use judicial process to obtain access to sports venues.<sup>752</sup> Though the legislative history of the administrative access regime contemplates that Part IIIA is the exclusive means to resolve access issues, the statute does not explicitly make this point.<sup>753</sup> In particular, the legislation is silent with respect to the use of section 46 of the TPA, the misuse of market power provision,<sup>754</sup> to obtain

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League saga to obtain access to a stadium in Newcastle, New South Wales).

748. Pengilley, *supra* note 734, at 251-52 (criticizing the administrative access regime because it fails to consider the misuse of market power in local markets); Kewalram, *supra* note 729, at 205 (criticizing the administrative access regime on the ground that Australian competition law is to promote competition in all, not just national, industries).

749. Bob Baxt, *Trade Practices and Shared Facilities*, 13 COMPANY DIRECTOR 31, 32 (Sept. 1997).

750. *Id.* at 32 (commenting that the drafters did not support such a "flexible interpretation" of the national significance requirement since they believed that only facilities akin to natural monopolies were subject to the forced access regime).

751. Pengilley, *supra* note 734, at 250-51 (noting the "legislative lacuna" between the administrative access regime and § 46 of the Trade Practices Act).

752. Griggs, *supra* note 744, at 43 n.21 (noting that sports organizations may try to use §§ 45 and 46 of the Trade Practices Act to obtain access to playing facilities).

753. Abadee, *supra* note 735, at 44 (noting that although Part IIIA does not mention § 46 of the Trade Practices Act, the report recommending the legislation emphatically argued that the regime "should provide an exhaustive statement of access rights" (quoting Report by the Independent Committee of Inquiry, National Competition Policy (Aug. 1993) [hereinafter Hilmer Report])).

754. Section 46 of the Trade Practices Act is akin to § 2 of the Sherman Act. Pengilley, *supra*



access to a facility in conjunction with, or instead of, Part IIIA.

Section 46 provides:

(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) preventing the entry of a person into that or any other market;

or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.<sup>755</sup>

Though open to debate, section 46 arguably incorporates the essential facility doctrine. This argument is strengthened by the points made in the Hilmer Report that:

(1) Where the facility is essential, the owner will always have a 'substantial degree of market power.' (2) A refusal to deal in this context will constitute the 'taking advantage' of market power, since in the absence of such power, access would be available. (3) A refusal to provide access could occur for any of the proscribed purposes.<sup>756</sup>

A mega-media company's use of section 46 to obtain access to a playing facility ultimately depends on the pre-emptive force the Australian authorities give to Part IIIA.<sup>757</sup> If "[s]ection 46 and the [ ] access regime are both applicable to essential facilities,"<sup>758</sup> then a mega-media company may seek access through both administrative and judicial channels. If Part IIIA completely preempts section 46 on access issues, then the administrative regime is the only option available to a mega-media company. Finally, section 46 and Part IIIA may co-exist with the former applying to access issues regarding local facilities and the latter used to resolve access disputes concerning facilities of national significance.

Of the three scenarios, the third one seems the most logical. The first

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note 724, at 16 ("The two statutes [§ 46 of the Trade Practices Act and § 2 of the Sherman Act] may have different wording, but they have the same economic and marketing thrust.").

755. Trade Practices Act, 1974, § 46(1) (Austl.).

756. Abadee, *supra* note 735, at 33 (internal quotations omitted). See also Kewalram, *supra* note 729, at 200 (matching the elements of § 46 with the MCI criteria); *id.* at 206 (concluding that at least a "vague outline" of the essential facility doctrine appears in § 46 of the Trade Practices Act).

757. Pengilley, *supra* note 734, at 251 (describing three possible scenarios for the interaction between Part IIIA and § 46).

758. *Id.*

scenario is irrational because “the possibility of courts granting what the NCC, the Minister, the ACCC and the Competition Tribunal would not, seems remote, especially when the laborious and expensive procedure [of Part IIIA] . . . is considered.”<sup>759</sup> The second option is not sensible because it would “involve some very significant backtracking in [Australian] competition law,” most notably with respect to section 46 decisions.<sup>760</sup> “It is simply not true that denial of access to an essential facility can occur only in the case of a facility of national importance.”<sup>761</sup> One commentator has suggested that the inconsistency and uncertainty in coverage under Part IIIA can be remedied by removing the national significance requirement from the statute and stating expressly that the competition law provisions of the TPA are not applicable to access disputes.<sup>762</sup> According to this commentator, such action is preferable to the third scenario because having “two [] access regimes running in tandem is highly unattractive.”<sup>763</sup>

Of course, the use of Part IIIA itself to provide access to playing venues is dependent on the construction given the national significance requirement.<sup>764</sup> If the relevant authorities construe narrowly the national significance requirement to exclude all sports facilities from the administrative access regime, then section 46 is the only legal basis on which a mega-media company may challenge a venue owner’s refusal to deal. To further read Part IIIA to be the exclusive means to seek access rights would eliminate all avenues of legal recourse to obtain forced access in the sports facilities context.

## CHAPTER FOUR

### MEDIA LEAGUES ARE POTENTIAL RIVALS TO ESTABLISHED LEAGUES

Currently, in the United States and Australia there is one major professional sports league in each sport. Heretofore, rival leagues have either folded or merged weakly with the established league in the sport. According to some commentators, rival leagues are not a threat to single league

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759. Abadee, *supra* note 735, at 44.

760. Pengilley, *supra* note 734, at 251.

761. *Id.*

762. *Id.* at 253.

763. *Id.*

764. See *supra* notes 749-54 and accompanying text (discussing national significance requirement).

dominance.<sup>765</sup> Recent events in Australia, however, caution against accepting this proposition. In particular, News Corporation's activities in Australia with Super League suggest that media leagues are potential viable rivals to established leagues.<sup>766</sup> Contrasting the histories of the United States Football League (USFL) and Super League, the most recent major rival leagues in the United States and Australia, respectively, provides insights on the difference between past rival leagues and a media league.

## I. TYPICAL RIVAL LEAGUE: UNITED STATES FOOTBALL LEAGUE

### A. *Development, Structure and Operation of the USFL*

The USFL's founders believed that the NFL did not completely satisfy the demand for professional football in the United States.<sup>767</sup> The unique aspect of the USFL's plan was to conduct its competition in the spring, a non-traditional season for football.<sup>768</sup> The USFL had a traditional American league structure with a central league office and individually owned clubs. To achieve and maintain competitive balance, each team had to meet financial criteria and adhere to strict budgetary controls, including a salary cap. Franchises were located in major media markets in order to increase the value of the league's product to a national television network or cable company. Each team was encouraged to sign a core of high profile coaches and players to improve the league's credibility with the fans and the media.<sup>769</sup> Profits were not immediately expected, with the owners anticipating an estimated \$2 million (U.S.) annual loss for three years

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765. Noll, *supra* note 463, at 365 ("The possibility of a new league being organized is not a tight check on the monopolistic position of teams and leagues."); Ross, *supra* note 9, at 706-07 (arguing that the significant expansion by established leagues in recent years has reduced the likelihood of rival league formation). But see BERRY & WONG, *supra* note 17, at x ("The prospects of a quick fix through television revenues and the availability of players from established leagues, now that free agency was more a reality, made new leagues feasible and infinitely more attractive. That many dreams were ill-conceived has not deterred entrepreneurs.").

766. Angelo Veljanovski, *The Superleague Cases and Statutory Contract*, 72 LAW INST. J. 57, 60 (Mar. 1998) ("There is no reason why all types of sporting competitions cannot be subjected to challenge by rival competitions and rival sports."); Corones, *supra* note 65, at 156 (noting that there is no reason why two independent and competing major leagues could not co-exist in the same sport).

767. David Dixon, the originator of the USFL, had a public opinion poll commissioned which showed considerable interest in the idea of a spring football league. In his prospectus, however, Dixon exaggerated the poll's findings to make the public demand for spring professional football appear to be much greater than it actually was. JIM BYRNE, *THE \$1 LEAGUE: THE RISE AND FALL OF THE USFL* 8-9 (1986). Thus, the USFL, from its inception, was plagued with problems stemming from a lack of strong central leadership.

768. *Id.* at 8.

769. *Id.* at 9-10.

before breaking even.<sup>770</sup>

The USFL initially adhered to its founding principles. Most franchise owners were wealthy individuals who could withstand the anticipated initial losses.<sup>771</sup> The first season of competition featured twelve teams, eight of which were located in the top ten television markets.<sup>772</sup> A national television network, ABC, and a cable company, ESPN, bought the USFL's television rights.<sup>773</sup> Many teams hired well-known coaches and a sampling of players with name recognition.<sup>774</sup>

Though the league had a very auspicious first weekend of play, attendance at games and television ratings dropped over the course of the first season.<sup>775</sup> By the end of its first campaign, the USFL had lost almost \$40 million (U.S.).<sup>776</sup> The losses were greater than expected for two reasons. First, many owners exceeded the salary cap.<sup>777</sup> Second, the USFL's contract with ABC gave the network substantial control over the broadcast and staging of the league's games. ABC made many decisions detrimental to the USFL.<sup>778</sup> Many USFL owners and the USFL Commissioner recognized these problems, but no one in the league could control the owners' spending practices or obtain concessions from ABC regarding the television contract.<sup>779</sup> From its beginning, the USFL was

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770. *Id.* at 19.

771. *Id.* at 10-11.

772. *United States Football League v. National Football League*, 842 F.2d 1335, 1351 (2d Cir. 1988) [hereinafter *USFL 2*].

773. *BYRNE*, *supra* note 767, at 17-19. ABC bought the free-to-air transmission rights for four years and agreed to pay the USFL \$18 million (U.S.) for each of the 1983 and 1984 seasons with options of \$14 million (U.S.) and \$18 million (U.S.) for the 1985 and 1986 seasons, respectively. ESPN agreed to pay the USFL \$4 million (U.S.) in 1983 and \$7 million (U.S.) in 1984. *See also USFL 2*, 842 F.2d at 1351.

774. *BYRNE*, *supra* note 767, at 46-48.

775. *Id.* at 52-55.

776. *USFL 2*, 842 F.2d at 1351.

777. *BYRNE*, *supra* note 767, at 42-45.

778. *Id.* at 20. The detrimental actions included (1) the requirement that the USFL designate at least two games to be played on Sunday afternoon with ABC having the exclusive right to televise these games, though the network had the discretion to broadcast only one contest each Sunday; (2) the lack of a "cross-feeding" requirement in the contract forcing ABC to broadcast another game into a home team's market when the home team failed to sell out its game and the game was being televised; (3) the lack of a requirement in the contract calling for ABC to televise all road games back to the home team's market; (4) ABC's right to select any USFL game for its weekly coverage, which effectively gave the network the power to force the movement of any game scheduled for Friday night to Sunday afternoon, if the stadium was available for that day; (5) ABC's right to renegotiate the rights payment to the USFL if the league failed to field a team in either New York, Los Angeles, or Chicago, or if it lost franchises in two or more of its original top ten television markets; and (6) the lack of a requirement that ABC blackout a team's home game when the game was not sold out.

779. *Id.* at 51, 64.

hampered by its traditional structure and dependency on the financial support of a mega-media company.

Change marked the USFL's second season. Four clubs moved locations.<sup>780</sup> More controversial was the decision to expand by six teams.<sup>781</sup> The most significant new development, however, was the introduction of Donald Trump as the new owner of the New Jersey Generals.<sup>782</sup> With Trump came talk about taking on the NFL head-to-head by switching the USFL to fall play.<sup>783</sup> Trump also greatly exacerbated the bidding war with the NFL for players as he signed many top NFL and college players, including signing NFL stars to "futures contracts" to take effect after their NFL contracts had expired.<sup>784</sup> Most importantly, it was Trump who first instigated discussions about a "merger strategy" that would lead to at least some of the USFL clubs, particularly the Generals, ultimately joining the NFL.<sup>785</sup>

By the end of the 1984 season, the USFL had completely abandoned its original plan of being a financially astute spring professional football league. In August 1984, the owners decided to play one more season in the spring and then move to a fall schedule in 1986.<sup>786</sup> This decision was made despite ABC's warning that a move to the fall would violate the terms of its contract as well as the contrary recommendations of a management consulting firm<sup>787</sup> and the USFL's director of operations and marketing.<sup>788</sup> The move to the fall indicated that Donald Trump had taken control over the league and had convinced a majority of the other owners to pursue the "merger strategy."<sup>789</sup> In addition to moving to a fall season to impair the NFL's television revenues, the "merger strategy" consisted of continuing the bidding war for players, shifting USFL franchises out of cities where NFL teams played and into possible NFL expansion cities, and filing an antitrust suit against the NFL.<sup>790</sup> Prior to the start

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780. *USFL 2*, 842 F.2d at 1351.

781. BYRNE, *supra* note 767, at 58-60. The USFL had originally planned to expand in its second year, but after the exorbitant losses of the first year, many owners wanted to delay awarding new franchises. *Id.*

782. *Id.* at 92.

783. *Id.* at 94.

784. *Id.* at 102, 116.

785. *Id.* at 160-61.

786. *Id.* at 205-06.

787. The USFL paid McKinsey & Co. \$600,000.00 to consider the advisability of moving to a fall season. *USFL 2*, 842 F.2d at 1352.

788. *Id.*

789. BYRNE, *supra* note 767, at 225.

790. *Id.* at 160, 222-24, 232-33. *See also USFL 2*, 842 F.2d at 1351-52.

of its third season, the USFL had taken each of these steps.<sup>791</sup>

The 1985 spring season saw the USFL barely surviving.<sup>792</sup> The league now had fourteen teams, the reduction in clubs due to the decision of several owners to fold rather than switch to a fall season in 1986.<sup>793</sup> Game attendance and television ratings fell throughout the season, continuing the decline from the league's inaugural weekend of play.<sup>794</sup> By the end of the third season, "several owners had withdrawn financial support for their teams and . . . were no longer meeting their payrolls."<sup>795</sup> Over three seasons, the USFL had lost almost \$200 million (U.S.).<sup>796</sup> Despite the low ratings, ABC offered a new television contract worth \$175 million (U.S.) for four years of spring football starting in 1986 and ESPN offered a contract worth \$70 million (U.S.) over three years.<sup>797</sup> The USFL rejected these offers and instead rested its survival on recovering a large damage award against the NFL in its antitrust suit.<sup>798</sup>

#### B. USFL v. NFL

The litigation between the USFL and the NFL "often is described as the 'television' case because the heart of the antitrust issues revolve around whether one league prevented the other from obtaining a television contract. . . ."<sup>799</sup>

In the suit, the USFL alleged that, in contravention of section 2 of the Sherman Act, the NFL had monopolized "the relevant [product] market of major league professional football in the United States, and a relevant [product] submarket of network television broadcasts of major league professional football in the Fall."<sup>800</sup> According to the USFL, the NFL had abused its monopoly power

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791. *USFL 2*, 842 F.2d at 1352.

792. *BYRNE*, *supra* note 767, at 339.

793. *USFL 2*, 842 F.2d at 1345 n.5.

794. *Id.* at 1351-53. *See also* *BYRNE*, *supra* note 767, at 340.

795. *USFL 2*, 842 F.2d at 1352. *See also* *BYRNE*, *supra* note 767, at 326-27.

796. *BYRNE*, *supra* note 767, at 2.

797. *USFL 2*, 842 F.2d at 1352.

798. *BYRNE*, *supra* note 767, at 346-47.

799. *Rosenbaum*, *supra* note 311, at 803.

800. *United States Football League v. National Football League*, 1986 WL 10620 (S.D.N.Y. July 31, 1986), at \*4 [hereinafter *USFL I*]. Specifically, the USFL and 14 owners of USFL clubs sued the NFL, the NFL Commissioner, and 27 of the 28 teams in the NFL. *See also* *USFL 2*, 842 F.2d at 1340-41. For the sake of simplicity, hereinafter the plaintiffs and defendants will be referred to as the USFL and NFL, respectively.

in a number of ways. The NFL had created a barrier to entry into professional football by entering into multi-year television contracts with each of the television networks. The NFL had also pressured the networks to abstain from televising USFL games in the spring or fall and, by threatening not to renew its television contracts, had successfully prevented any network from agreeing to broadcast USFL games in the fall. In addition, the USFL argued that the NFL's concern with the "dilution effect" USFL telecasts would have on advertising during NFL games had motivated the established league to pressure the networks not to televise USFL games.<sup>801</sup> The USFL's "dilution effect" argument was based on the hypothesis that if a network carried USFL games as well as NFL games, then the increased amount of professional football on television would force the networks to charge lower prices for advertising on NFL games. In turn, the NFL would receive less money for its broadcast rights.<sup>802</sup>

The USFL also asserted that the NFL had pursued the strategy outlined in the "Porter Presentation" to bankrupt the USFL.<sup>803</sup> The Porter Presentation was an exposition by Harvard Business School Professor Michael Porter to sixty-five NFL executives that set out a strategy for the NFL to conquer the USFL. The presentation suggested that the NFL: (1) co-opt powerful USFL owners by offering them NFL franchises, (2) encourage ABC not to continue USFL broadcasts, (3) pressure ABC to drop the USFL by giving it an unattractive schedule for its Monday Night Football program, (4) target important USFL players for signing with the NFL through means such as the NFL's Supplemental Draft and an expanded roster, and (5) attempt to bankrupt the weakest USFL teams by driving up USFL player salaries in order to diminish the USFL's size and credibility.<sup>804</sup>

The USFL accused the NFL of violating section 1 of the Sherman Act as well.<sup>805</sup> The USFL charged that the NFL had conspired to exclude all competition within major league professional football, to control access to the television networks, and to reinforce its monopoly power.<sup>806</sup> In the USFL's opinion, the NFL's contract with all three networks, annual rotation of the Super Bowl among the networks rather than awarding the rights to the highest bidder, excessively high rights fees, and implementation of the Porter Presentation strategy had furthered the conspiracy.<sup>807</sup>

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801. *USFL 2*, 842 F.2d at 1355-57.

802. *Id.*

803. *Id.* at 1342-43.

804. *Id.* (discussing the Porter Presentation).

805. *USFL 1*, 1986 WL 10620, at \*26.

806. *USFL 2*, 842 F.2d at 1343.

807. *Id.*

In defense, the NFL argued that the correct relevant product submarket was not network television broadcasts of major league professional football in the fall, but rather entertainment broadcasting generally, a market in which the NFL did not have monopoly power.<sup>808</sup> The NFL denied that it had monopolized either the market for major league professional football or the USFL's claimed television submarket. The NFL's contracts with the three major networks were not exclusionary since each one explicitly stated that the network was free to televise the professional football games of another league. The USFL had failed to secure a fall network contract because each network had judged the USFL's product to be inferior to the NFL's product and of little market value. The NFL had never threatened a network with non-renewal of its contract or an unattractive slate of games. The Porter Presentation strategy was never undertaken. Finally, its own mismanagement, not NFL action, had caused the USFL's losses.<sup>809</sup>

At trial, the jury found a relevant product market existed in major league professional football in the United States and that the NFL had violated section 2 by willfully acquiring or maintaining monopoly power in this market.<sup>810</sup> However, the jury found that the USFL had only suffered nominal damages from the NFL's unlawful conduct and, therefore, was entitled to only one dollar in damages, trebled to three dollars under American antitrust law.<sup>811</sup> With respect to the crucial television claims, the jury found that the NFL had not willfully acquired or maintained monopoly power in a relevant television submarket and had not restrained trade in violation of section 1.<sup>812</sup>

The USFL appealed the unfavorable rulings on its claims. The appellate court rejected the USFL's contention that by contracting with each network the NFL had violated the antitrust laws.<sup>813</sup> The court based its holding on the

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808. *Id.*

809. *Id.*

810. *Id.* at 1353.

811. *USFL 2*, 842 F.2d at 1341.

812. *Id.* at 1353. The jury did not clearly define the parameters of the relevant television submarket, only noting on the verdict sheet that there was a television submarket in "broadcasting rights." The jury did not specify whether these rights included rights to entertainment programming in general or whether the submarket included independent television stations and cable companies as well as networks. *Id.* at 1366-67. On appeal, the USFL argued that the ambiguity surrounding the jury's definition of the relevant television submarket warranted a new trial on the section two claim. *Id.* at 1361. The appellate court rejected the USFL's request. *Id.* at 1367. The court believed that the jury's lack of clarity in expressing its definition of the relevant market was not prejudicial error since the jury had rejected all of the plaintiff's television-based antitrust claims, including the section 1 allegations. *Id.* at 1366-67. The jury's conclusions on the ultimate issues showed that it did not believe that the NFL had engaged in anti-competitive conduct with respect to the televising of professional football games, irrespective of the proper definition, if any, of the television submarket. *Id.*

813. *Id.* at 1355.



statutory language and legislative history of the Sports Broadcasting Act (SBA).<sup>814</sup> The SBA exempted from the antitrust laws "any joint agreement . . . by which any league . . . sells . . . all or any part of the rights of such league's member clubs in the sponsored telecasting of the games . . . engaged in or conducted by such clubs."<sup>815</sup> The SBA thus allowed a traditional league like the NFL to sell the broadcasting rights of its member clubs in a package and divide the revenue from such a sale among the clubs without being subject to antitrust attack.<sup>816</sup> According to the court, the language of the SBA was unambiguous and neither stated nor implied that the antitrust exemption for pooled-rights contracts was limited to a single contract with one network.<sup>817</sup> Furthermore, the legislative history provided no reason to depart from the natural interpretation of the statutory language.<sup>818</sup> In congressional hearings preceding the SBA's enactment, the Commissioner of the American Football League, which later merged with the NFL, had expressed concern that the SBA would allow the NFL to contract with impunity with each national network in order to preclude a rival professional football league from obtaining a national television contract.<sup>819</sup> To clarify the statute's scope, the House report accompanying the SBA emphasized that no "exemption from the antitrust laws should be made available to a league or its members where the intent or effect of a joint agreement is to exclude a competing league or its members from the sale of any of their television rights."<sup>820</sup> In addition, at the time of the NFL/AFL merger, the NFL had candidly informed Congress that the enlarged league would broadcast its games on at least two networks.<sup>821</sup> In approving the merger, Congress had expressed no concern that such action might fall outside the SBA antitrust exemption.

The court found many flaws in the USFL's "dilution effect" arguments.<sup>822</sup> First, no "dilution effect" was present when the NFL's network contracts expired and negotiations started anew.<sup>823</sup> At that time, each professional league was free to compete on the basis of the quality of its product without regard to prior

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814. *Id.* at 1353-55 (discussing the Sports Broadcasting Act).

815. 15 U.S.C. § 1291 (1994).

816. *USFL 2*, 842 F.2d at 1353-55.

817. *Id.* at 1354.

818. *Id.*

819. *Id.* See also *USFL v. NFL*, 634 F. Supp. 1155, 1162 (S.D.N.Y. 1986).

820. *USFL 2*, 842 F.2d at 1354 (quoting H.R. REP. NO. 1178 87-4 (1961)).

821. *Id.* (noting NFL's notice to Congress about having a contract with more than one television network).

822. *Id.* at 1355-57.

823. *Id.* at 1356.

contracts.<sup>824</sup> With respect to the USFL's 1986 fall season, the NFL's network contracts expired in 1986 so that, regardless of its magnitude in past years, whatever "dilution effect" existed at that time could not have affected the USFL's negotiations with the networks.<sup>825</sup>

Second, the USFL had assumed that the "dilution effect" was the same for each network and calculated its losses solely on the "dilution effect" estimates CBS had made in 1984.<sup>826</sup> The USFL's assumption was erroneous, especially with regard to the potential "dilution effect" suffered by ABC, the network with which the USFL had the greatest probability of securing a fall television contract.<sup>827</sup> Since ABC only had the right to show NFL games primarily during prime time on Monday nights, its "dilution effect" would have been considerably less than the "dilution effect" of CBS or NBC, which televised NFL games on Sunday afternoons.<sup>828</sup> Moreover, two ABC executives had testified that the major cause for the diminished value of the USFL's product for 1986 was the USFL's exodus from major television markets.<sup>829</sup>

Third, the bargaining history between the networks and the NFL did not support the "dilution effect" theory.<sup>830</sup> If there was a "dilution effect," then the NFL would have desperately wanted to reach an agreement with each network in order to preclude the televising of USFL games.<sup>831</sup> Contrary to the USFL's hypothesis, the NFL did not manifest a desire to lock up all three networks.<sup>832</sup> During negotiations, the NFL commissioner often threatened a network that the league would sell exclusive transmission rights to a competing broadcaster.<sup>833</sup> More importantly, each NFL television contract allowed the network to broadcast the games of a rival league.<sup>834</sup>

Additionally, if the "dilution effect" theory was valid, then the last network to enter into a contract with the NFL would have been in the best bargaining position since it would have been a "holdout" with respect to the NFL's plan to

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824. *Id.*

825. *USFL 2*, 842 F.2d at 1356-57. Mega-media companies generally begin negotiations with a professional sports league for a new contract at least one year in advance of the expiration of the league's current television deals. *BYRNE, supra* note 767, at 162-68.

826. *USFL 2*, 842 F.2d at 1356.

827. *Id.*

828. *Id.*

829. *Id.*

830. *Id.* at 1357.

831. *USFL 2*, 842 F.2d at 1357 n.19.

832. *Id.* at 1357.

833. *Id.*

834. *Id.* at 1348.

monopolize the television market.<sup>835</sup> In the actual negotiations, the opposite situation was true.<sup>836</sup> In the last series of bargaining sessions in 1982, the NFL had already entered into agreements with NBC and ABC before approaching CBS.<sup>837</sup> At trial, the President of CBS Sports had testified that the network had considered itself in a very disadvantageous bargaining position by being the only network without a NFL contract for the upcoming seasons.<sup>838</sup> The contract CBS ultimately signed with the NFL required it to increase its rights payments by more than 100%, hardly the outcome for one with superior bargaining power.<sup>839</sup>

Even if the "dilution effect" theory was legitimate, the court believed that the jury could have found that this factor had not caused the USFL's failure to procure a network contract for fall 1986.<sup>840</sup> Numerous events had occurred after the 1984 study on which the USFL based its "dilution effect" argument. For instance, the United States Supreme Court's ruling in *NCAA v. Board of Regents*<sup>841</sup> had dramatically increased the amount of college football on television.<sup>842</sup> Throughout the 1980s, sports programming in general had dramatically increased. By 1986, the USFL was simply facing increased competition from other programming options.<sup>843</sup> The USFL, through mismanagement, had significantly damaged its product.<sup>844</sup> In sum, the evidence showed that the expected revenues from telecasting USFL games were so low that a network could have reasonably decided not to purchase the league's rights irrespective of any possible "dilution effect."<sup>845</sup>

The USFL's hopes of success through litigation were thus dashed and the league folded.

### C. Epilogue

The USFL's experience was similar to those of past rival leagues in the

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835. *Id.* at 1357.

836. *USFL 2*, 842 F.2d at 1357.

837. *Id.*

838. *Id.*

839. *Id.*

840. *Id.*

841. 468 U.S. 85 (1984).

842. *USFL 2*, 842 F.2d at 1357.

843. *Id.*

844. *Id.* The USFL made numerous poor management decisions. The plethora of USFL franchise relocations inhibited the building of a loyal fan following. The move to the fall created a major rift between USFL owners. The USFL's abandonment of several major television markets decreased the number of households advertisers were likely to reach during an USFL telecast.

845. *Id.*

United States. The USFL's traditional structure proved problematic. The club owners became divided over whether to pursue a merger strategy or adhere to their original business plan. The lack of a strong central authority to direct the league's focus promoted mismanagement. The USFL's chances of survival were directly proportional to its ability to convince a mega-media company to purchase its product. Once the USFL lost purchasers for its transmission rights, its prospects for survival were negligible.

## II. MEDIA LEAGUE AS A RIVAL LEAGUE: NEWS CORPORATION'S SUPER LEAGUE

### A. *Collective Action Problem in the ARL and Developments in Australian Media Industry Lead to Super League*

The genesis of Super League was a 1988 decision by the ARL<sup>846</sup> to award an expansion license to a group of investors for a new team in Brisbane, Queensland.<sup>847</sup> The Brisbane Broncos were to become the only privately owned team in the ARL.<sup>848</sup>

From the first day of the club's operations, the Broncos and the ARL administration disagreed over a plethora of issues, particularly with regard to the club's commercial dealings.<sup>849</sup> The ARL fined the Broncos for undertaking marketing activities that conflicted with the league-wide sponsorship agreements.<sup>850</sup> The Broncos and league argued about the club's adherence to the salary cap.<sup>851</sup> The Broncos continually accused the ARL administration of partiality toward the Sydney-based clubs, while the ARL board chastised the club for pursuing its financial interests rather than promoting the league as a whole.<sup>852</sup> On several occasions, the ARL informed the Broncos that the club was free to

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846. Professional rugby league in Australia has governing organizations at the national and state levels. At the time of Super League, the ARL was the national body and the New South Wales Rugby Football League, Ltd. (NSWRL) and the Queensland Rugby Football League, Ltd. (QRL) were the respective state bodies. For purposes of clarity, the Australian established rugby league competition organizer will be assumed to be the ARL, with the intricate relationships between the national and state organizations ignored, unless otherwise noted. The NSWRL and QRL are still in operation after the Super League saga.

847. ARTHURSON, *supra* note 51, at 181 (linking the beginning of Super League to the admission of the Brisbane Broncos into the ARL).

848. ROY MASTERS, *INSIDE OUT: RUGBY LEAGUE UNDER SCRUTINY* 10 (1997).

849. COLMAN, *supra* note 5, at 25, 47, 52-53.

850. *Id.* at 46-47.

851. *Id.* at 57-58.

852. ARTHURSON, *supra* note 51, at 184.

start its own competition if it did not want to obey league rules.<sup>853</sup>

The animus between the Broncos and the ARL reached its peak in 1993. In that year, the league replaced the Broncos' chief executive officer, John Ribot, on an important league committee, announced it was adding a second team in Brisbane over the Broncos' objections, and rejected the Broncos' request to host the 1995 Grand Final, the league's championship game.<sup>854</sup> The last decision was particularly upsetting to the Broncos since the club had guaranteed the ARL a profit of \$2.6 million (Aud) from hosting the Grand Final, significantly more than the league usually received from the championship game, and the proposal had the support of a number of other clubs.<sup>855</sup> The ARL later awarded the city of Brisbane the right to host a semifinal match, but the game was not to be played in the Broncos' home stadium, a move that further sparked the club's ire.<sup>856</sup> The constant conflicts with the ARL led the owners of the Broncos to consider seriously the prospects of acting on the ARL's taunt of starting a rival league.<sup>857</sup>

In 1994, John Ribot contacted News Corporation (News), a Broncos' sponsor, about creating a new rugby league competition.<sup>858</sup> Ribot envisioned News as the central competition organizer for the new league.<sup>859</sup> Intrigued, News decided to start "Super League."<sup>860</sup> News' plan called for an Australia-wide competition (with one team from New Zealand) comprised of twelve privately owned teams, four of which would be owned by News.<sup>861</sup> In addition to its four clubs' share of the revenues, News would receive a fifteen percent management fee for operating Super League.<sup>862</sup> News would also own the league's transmission rights.<sup>863</sup>

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853. COLMAN, *supra* note 5, at 47.

854. *Id.* at 45, 51.

855. *Id.* at 56-57.

856. *Id.*

857. *Id.* at 57.

858. *Id.* at 62-63.

859. *Id.*

860. *News Ltd.*, 1996 WL 3310742, at \*23.

861. *Id.*

862. *Id.*

863. Anthony McInerney, *The Super League Litigation: Has Klor's Inc. v. Broadway Hale Stores Come Down Under?*, 25 AUSTL. BUS. L. REV. 384, 387 (1997).

News wanted to establish a Super League for two reasons. First, News would . . . receive benefits such as revenue from sponsorship, free-to-air and pay television rights, gate takings and merchandising. . . . Secondly, News wished to challenge the exclusive television rights to the League's competition held by Channel Nine, a television station controlled by Mr. Kerry Packer. . . .

*Id.* (internal quotations omitted). News had started a cable television venture with Telstra, the government-owned telecommunications company.

Because its primary objective was to increase subscriptions to its new cable television system, News decided to make Super League the premium rugby league competition in Australia. To achieve this goal, News believed that, in addition to the services of the leading players, having certain ARL clubs join Super League was critical because of their goodwill with consumers.<sup>864</sup> In an attempt to avoid confrontation, News offered the ARL a subsidiary role in Super League before approaching the ARL clubs about switching allegiances.<sup>865</sup>

The ARL rejected News' overture and sought to preserve its league. The ARL asked each club to sign a "Commitment Agreement."<sup>866</sup> Under the Commitment Agreement, a club was guaranteed entry for five seasons into the ARL's competition in exchange for the club's promise to play only in an ARL-approved league.<sup>867</sup> Prior to this agreement, each club applied annually for entry into the ARL.<sup>868</sup> Though entry was almost always granted, no club had an automatic right to participate in the annual competition and the ARL had previously denied a club entry into the league.<sup>869</sup> Eager to obtain guaranteed admission to the established league, each of the twenty ARL clubs—including the Broncos—executed a Commitment Agreement.<sup>870</sup>

News continued with its Super League plans.<sup>871</sup> News executed "Super League Confidentiality Deeds" with five ARL clubs.<sup>872</sup> Under the agreements, News promised to use its best efforts to persuade the ARL to participate in the new league. Each club agreed to keep all information relating to Super League in strict confidence, to participate for the next eighteen months only in an ARL or News operated rugby league competition, and not to discharge any of its players without the prior consent of News.<sup>873</sup>

In a final attempt to gain the ARL's support, News presented its Super League proposal to a meeting of representatives of the ARL clubs.<sup>874</sup> News described Super League as a twelve-team national competition that was to be an

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864. COLMAN, *supra* note 5, at 76 (describing News' strategy to recruit ARL clubs to Super League).

865. *News Ltd.*, 1996 WL 33110742, at \*25.

866. *Id.* at \*24.

867. *Id.*

868. *See supra* notes 266-75 and accompanying text (discussing clubs' applying to play in Australian rugby league competitions).

869. *Id.*

870. *News Ltd.*, 1996 WL 33110742, at \*24, \*26.

871. *News Ltd.*, [1996] 870 F.C.A. at \*53-\*54 (AustLII.edu.au, Austl. Case Law).

872. *Id.*

873. *Id.*

874. *News Ltd.*, 1996 WL 33110742, at \*28.

integral part of an international competition.<sup>875</sup> The twelve Super League teams were to be privately owned, but each ARL club was to receive an equity share in a Super League club.<sup>876</sup> The ARL's twenty-team competition was to continue as a minor league to the Super League competition.<sup>877</sup> The ARL was to run the international test matches involving the Australian national team.<sup>878</sup> A board of directors, on which News would have majority representation, was to control Super League.<sup>879</sup>

The ARL clubs unanimously rejected the Super League proposal because it removed control over professional rugby league from the ARL.<sup>880</sup> After rejecting News' proposal, each ARL club entered into a "Loyalty Agreement" with the ARL.<sup>881</sup> Under the Loyalty Agreement, each club reaffirmed that it would participate exclusively in the ARL for the next five seasons (1995-1999).<sup>882</sup> In addition, each club agreed to maintain the services of its existing and future-contracted players for the duration of the players' contracts in order to prevent them from playing for Super League.<sup>883</sup> Furthermore, the clubs pledged not to have any interest in or involvement with any other rugby league organization that might undermine the quality of the ARL.<sup>884</sup>

Having failed to gain the ARL's support, News embarked on a new, more aggressive plan to create Super League.<sup>885</sup> News believed that it needed, at a minimum, to sign enough ARL players to stock ten Super League teams.<sup>886</sup> More ambitiously, News hoped to acquire sufficient ARL players, coaches, and officials to decimate the ARL and force it to capitulate to Super League.<sup>887</sup> In March 1995, News started signing ARL players to contracts under which the players agreed to play only in Super League. In exchange, the players received salaries and signing bonuses much larger than they had previously garnered from ARL clubs. Since many players were tied to their ARL clubs through the Commitment and Loyalty Agreements, News also filed suit against the ARL

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875. *News Ltd.*, [1996] 870 F.C.A. at \*55 (AustLII.edu.au, Austl. Case Law).

876. *Id.*

877. *Id.* at \*50, \*54-\*56.

878. *Id.* at \*55.

879. *Id.* at \*53-\*54.

880. *News Ltd.*, [1996] 870 F.C.A. at \*53-\*54 (AustLII.edu.au, Austl. Case Law).

881. *Id.* at \*57.

882. *Id.*

883. *Id.* at \*58.

884. *Id.* at \*62.

885. *News Ltd.*, [1996] 870 F.C.A. at \*61 (AustLII.edu.au, Austl. Case Law).

886. *Id.*

887. *News Ltd.*, 1996 WL 33110742, at \*34.

alleging that these Agreements violated the Trade Practices Act.<sup>888</sup>

PBL, owner of the ARL's television rights, was very concerned about the possible demise of the ARL. PBL rejected an offer from News to work together in developing Super League.<sup>889</sup> Optus Vision, News' rival cable operator in Australia, was also wary of Super League. Optus Vision had contracted to carry ARL matches and was relying on this programming to build subscriptions. The ARL successfully recruited PBL and Optus Vision to fund a bidding war against News for players.<sup>890</sup> In exchange for becoming the ARL's hired gun, PBL/Optus Vision received a five-year extension on their television contracts with the ARL, the right to bid first and last for the ARL's transmission rights when the current contracts expired, and veto power over any change in the format of the ARL's on-field competition.<sup>891</sup> The ARL also counter-sued alleging unlawful injury caused by News' actions in starting Super League.<sup>892</sup>

News continued its attempts to sway ARL clubs to join Super League.<sup>893</sup> By April 20, 1995, seven clubs had switched to Super League.<sup>894</sup> For each "rebel club," News created a Super League Franchisee, the entity that would play in News' rugby league competition.<sup>895</sup> The Franchisee was the entity that formally contracted with the players.<sup>896</sup> Two documents, the "Head of Agreement" and the "Club Deed," facilitated the transfer of the interests and assets of each rebel club to an interest in a Super League Franchisee.<sup>897</sup> The "Head of Agreement" established the relationship between News as the competition organizer and the Franchisee as the team competing in Super

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888. *News Ltd.*, [1996] 870 F.C.A. at \*65 (AustLII.edu.au, Austl. Case Law).

889. *Id.* at \*63.

890. *Id.* See generally *Corones*, *supra* note 65, at 150.

The dispute had as much to do with the pay TV market as with the organization of a new rugby league football competition. There are two major pay TV operators in Australia: Foxtel, a joint venture between News Ltd[,] and Telstra; and Optus Vision, a joint venture between Optus and interests associated with Packer publishing group [*i.e.*, PBL] which owns Channel 9 in each major urban center.

*Id.*

891. *News Ltd.*, [1996] 870 F.C.A. at \*63 (AustLII.edu.au, Austl. Case Law).

892. *Id.* at \*64.

893. *Id.*

894. *Id.* These seven clubs were labeled the "rebel clubs," while the ARL clubs refusing to join Super League were designated the "loyal clubs." *Id.* at \*68.

895. *Id.* at 64.

896. *News Ltd.*, [1996] 870 F.C.A. at \*65 (AustLII.edu.au, Austl. Case Law). The standard terms applicable to every player contract expressly stated that the relationship between the player and the Franchisee was one of employee and employer, with the player to be a full time employee. *Id.* In addition, the contract prohibited the player from playing for any team other than the Super League Franchisee. *Id.* at \*66.

897. *Id.* at \*64-\*65.



League.<sup>898</sup> The parties to the Head of Agreement were News, the Franchisee, and Star League Pty Ltd. (SLPL), the wholly-owned subsidiary News created to administer and run Super League.<sup>899</sup> The Agreement stated that News was creating a rugby league competition as a rival to the ARL and that the Franchisee was to field its best team to participate in Super League.<sup>900</sup> Under the agreement, News granted each Franchisee a license to operate in a particular geographic area and the right to use and license the team's name and logo.<sup>901</sup>

The "Club Deed" was a contract between News, a rebel club, and the particular Super League Franchisee corresponding to that club.<sup>902</sup> News gave each rebel club an equity share in its respective Franchisee.<sup>903</sup> The Club Deeds freed the players from their ARL obligations so that they could play for a Super League Franchisee.<sup>904</sup> News agreed to indemnify each club and its officers and directors from any liability incurred from a breach of the Commitment and Loyalty Agreements.<sup>905</sup>

On the eve of trial, three hundred seven players, ten coaches, and eight ARL clubs were aligned with Super League.<sup>906</sup> In addition, News had entered into agreements with the rugby league organizers in Europe, New Zealand, and the South Pacific for clubs in those areas to play internationally only in News-sponsored events.<sup>907</sup> Through these international arrangements, News effectively wrested control of international rugby league matches involving Australian players from the ARL.<sup>908</sup> A player wanting to play in representative matches for Australia, the highest reward in the sport, would have to join Super League.

News had indeed mounted a serious challenge to the ARL and intended to

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898. *Id.*

899. *Id.*

900. *Id.* at \*64.

901. *News Ltd.*, [1996] 870 F.C.A. at \*64 (AustLII.edu.au, Austl. Case Law). Pursuant to the Head of Agreement, News owned all intellectual property rights associated with Super League and the Franchisees, except for the team names. *Id.*

902. *Id.* As with the Heads of Agreements, SLPL was also a party to the Club Deeds. *Id.*

903. *Id.*

904. *Id.* at \*65.

905. *Id.*

906. *News Ltd.*, [1996] 870 F.C.A. at \*66 (AustLII.edu.au, Austl. Case Law). By the time the trial court's decision was appealed, the number of ARL players on Super League rosters was 300 because 7 players had their Super League contracts subsequently cancelled through agreement or court decree. *Id.*

907. COLMAN, *supra* note 5, at 198-201 (detailing News' arrangements with the English and New Zealand rugby league clubs).

908. *Id.* at 205.

start Super League play in fall 1996.<sup>909</sup> Contrary to the American USFL experience, in Australia the established league, not the rival, was fighting for survival. Losing in litigation over the validity of the Commitment and Loyalty Agreements was the only barrier to News' obtaining significant control over the sport of professional rugby in Australia.

*B. News Ltd. v. ARL*

News claimed that the Commitment and Loyalty Agreements contained exclusionary provisions in violation of section 45(2)(a)(i) of the TPA.<sup>910</sup> Section 45(2) provides:

A corporation shall not:

(a) make a contract or arrangement, or arrive at an understanding if:

(i) the proposed contract, arrangement or understanding contains an exclusionary provision . . . .<sup>911</sup>

Section 4D of the TPA defines an exclusionary provision.

A provision of a contract, arrangement or understanding . . . shall be taken to be an exclusionary provision . . . if:

(a) the contract or arrangement was made, or the understanding was arrived at . . . between persons any 2 or more of whom are competitive with each other; and

(b) the provision has the purpose of preventing, restricting, or limiting:

(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or

(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;

by all or any of the parties to the contract, arrangement, or understanding.<sup>912</sup>

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909. *News Ltd.*, [1996] 870 F.C.A. at \*67 (AustLII.edu.au, Austl. Case Law).

910. *News Ltd.*, 1996 WL 33110742, at \*77.

911. Trade Practices Act, 1974, § 45(2)(a)(i) (Austl.).

912. *Id.* § 4D. To contravene section 45(2) of the Trade Practices Act, all elements of the statutory definition of an exclusionary provision must have been present at the time the parties

News alleged that each Agreement was a contract between the ARL and a club, which competed against all the other ARL clubs, that had the purpose of restricting the club from acquiring the services of a competition organizer alternative to the ARL, from supplying its services to a competition organizer alternative to the ARL, and from acquiring the services of players to play in a rugby league competition alternative to the ARL.<sup>913</sup>

The trial court first sought to determine if the ARL clubs were, at the time of execution of the Commitment and Loyalty Agreements, in competition with each other for the services that were the subject of the alleged exclusionary provisions.<sup>914</sup> After reviewing the history, structure, and operation of the ARL and the clubs, the court concluded that the clubs were not competitive with one another in the required statutory sense.<sup>915</sup> The court analogized the ARL to a joint venture or partnership.<sup>916</sup> Like the partners in a partnership, the league and the clubs were cooperating with one another, not competing, to achieve success.<sup>917</sup> The Memoranda and Articles of Association of the ARL and the clubs indicated that the clubs had given the ARL the power to determine which teams would provide their services to the league.<sup>918</sup> At the time the Agreements were executed, the clubs undoubtedly believed that the ARL controlled admission to the league.<sup>919</sup> Though each club had to apply annually to play in the ARL, admission was granted once the club met the league's objective criteria.<sup>920</sup> According to the trial court, the clubs were not competing for a position to play in the ARL.<sup>921</sup>

In the opinion of the trial judge, the clubs obviously were not competing with one another for the services of an alternative competition organizer since News' services were not available to the clubs at the time the Commitment and the

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entered into the contract, arrangement, or understanding. *See also News Ltd.*, 1996 WL 33110742, at \*77-\*78.

913. *News Ltd.*, 1996 WL 33110742, at \*77-\*78.

914. *Id.* at \*78. News did not allege that the clubs were in competition with the ARL. *Id.* at \*78. Consequently, the Commitment and Loyalty Agreements could contain exclusionary provisions if and only if the ARL clubs were in competition with one another in acquiring the services of a competition organizer, supplying their services to a competition organizer, or acquiring the services of players to play in a league. *Id.* at \*77-\*79.

915. *Id.* at \*78-\*80.

916. *Id.* at \*80-\*82.

917. In making this analogy, the judge relied heavily on American precedent and sources that characterized a professional sports league as a joint venture. *Id.*

918. *News Ltd.*, 1996 WL 33110742, at \*82.

919. *Id.* at \*84.

920. *Id.*

921. *Id.* at \*84.

Loyalty Agreements were executed.<sup>922</sup> Prior to signing the Agreements, the clubs had pledged to play only under the auspices of the ARL and News had assured the ARL and the clubs that any alternative league would be under the ARL's control.<sup>923</sup>

Though the ARL clubs were competing with each other for the services of players to participate in the ARL, the trial court held that the form of these services took such competition outside the purview of the TPA.<sup>924</sup> Section 4(1) of the TPA explicitly states that the Act does not apply to services supplied under an employment contract.<sup>925</sup> At the time the Commitment and Loyalty Agreements were executed, the club and players were in an employer-employee relationship. The clubs were not, therefore, in competition with one another for services recognized under the TPA.<sup>926</sup>

The trial court also rejected News' exclusionary provision claim because neither the ARL nor a club entered into the Agreements with the requisite statutory purpose.<sup>927</sup> The ARL's motive for entering into the Agreements was to preserve the quality of its league by reaching long-term commitments with the clubs, not to restrict the clubs from providing their services to News.<sup>928</sup> The clubs had a legitimate incentive for contracting with the ARL in order to secure admission into the league for an extended period of time.<sup>929</sup> The Agreements facilitated the business operations of both the ARL and the clubs since each of them had entered into long-term contracts with other firms (*e.g.*, sponsors, stadium authorities) based on the continued vitality of the ARL.<sup>930</sup>

Finally, the trial court ruled that News had failed to prove that the clubs had reached a "meeting of the minds" sufficient to create a contract, arrangement, or understanding between them.<sup>931</sup> The Agreements were vertical arrangements between the ARL and each club, not a horizontal contract between the clubs.<sup>932</sup> Based on its findings and determinations, the trial court ordered News to stop all

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922. *Id.* at \*85.

923. *News Ltd.*, 1996 WL 33110742, at \*85.

924. *Id.* at \*88-89.

925. Trade Practices Act, 1974, § 4(1) (Austl.).

926. *News Ltd.*, 1996 WL 33110742, at \*89.

927. *Id.* at \*96.

928. *Id.* at \*95.

929. *Id.*

930. *Id.* The trial court further concluded that even if the ARL or a club had an anti-competitive motive for entering into the Commitment and Loyalty Agreements, this purpose was not a "substantial purpose" for making these contracts and thus did not meet the statutory requirement. *Id.* at \*96.

931. *News Ltd.*, 1996 WL 33110742, at \*101-102.

932. *Id.* at \*100-101.

activities in relation to Super League and not to interfere with the ARL's operations for the term of the Agreements.<sup>933</sup>

On appeal, the Full Federal Court reversed the trial court's judgment and held that the Agreements contained unlawful exclusionary provisions.<sup>934</sup> According to the court, the ARL clubs were competitive with one another with respect to supplying their teams to, and acquiring the services of, a competition organizer such as the ARL or News.<sup>935</sup> At least some of the clubs competed to retain their position in the ARL since they vied for spectators and sponsors in order to meet the criteria for annual admission into the league.<sup>936</sup> The clubs' execution of confidentiality agreements with News indicated that some of them were competing for entry into Super League.<sup>937</sup> The clubs' contemporaneous execution of the Agreements in response to the ARL's plea that they cooperate to fend off Super League clearly showed a common understanding among them.<sup>938</sup> The testimony of high-ranking ARL officials that the ARL was trying to combat News by locking all the clubs into the established league for five years reflected the true motivation for the Agreements.<sup>939</sup> The court rejected the ARL's contention that the Agreements were executed only with the desire to preserve the quality of the league.<sup>940</sup> Since a substantial purpose behind the Agreements was to prevent the clubs from supplying their services to, and from acquiring the services of, an alternative competition organizer, the intent element of News' exclusionary provision claim was satisfied.<sup>941</sup>

Since the Agreements contained exclusionary provisions, they were void and without effect under Australian law.<sup>942</sup> The Full Federal Court reversed the trial court's orders. News was now free to promote and operate Super League, including contracting for the services of ARL players, coaches, and rebel ARL clubs.

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933. *Id.* at \*122.

934. *News Ltd.*, [1996] 870 F.C.A. at \*116 (AustLII.edu.au, Austl. Case Law).

935. *Id.* at \*110. The court did not resolve the issue of whether the competition between clubs for the services of players to play in professional sports league fell under the purview of the Trade Practices Act. The court, however, intimated that the Trade Practices Act applied to the competition for players because there was a real chance that the clubs would engage players to play under an agreement other than a contract of service, such as an independent contractor agreement. *Id.* at \*110.

936. *Id.* at \*106.

937. *Id.* at \*108-\*109. Contrary to the trial judge, the Federal Court considered News to be a viable alternative competition organizer to the ARL when the Commitment and Loyalty Agreements were executed. *Id.*

938. *Id.* at \*110-\*111.

939. *News Ltd.*, [1996] 870 F.C.A. at \*113 (AustLII.edu.au, Austl. Case Law).

940. *Id.* at \*115.

941. *Id.*

942. *Id.* at \*116.

*C. Epilogue: Does Super League Provide Hope for Rival Leagues?*

News and the ARL conducted parallel rugby league competitions in 1997.<sup>943</sup> The two leagues competed fiercely for players, sponsors, and supporters. Neither league fared particularly well during that year. The bidding war for players dramatically increased the operating costs of each league.<sup>944</sup> Fans became disenchanted with the constant controversy surrounding the two leagues and public sentiment for professional rugby league dropped below its pre-Super League level. Following the 1997 season, the ARL and News entered into a partnership to organize a single rugby league competition—the National Rugby League (NRL).<sup>945</sup>

Though the ultimate outcome of the Super League saga was a return to the traditional single-league state, the Australian experience speaks to the possibility of future rival leagues. News' creation of Super League demonstrates that a mega-media company has the resources to launch a premium rival league despite opposition from the established league in a sport. News' ability to continue operating and marketing Super League despite escalating costs from the bidding war for players and negative publicity from ARL-aligned media interests is a testament to the capabilities of a mega-media company. News' vitality both during and after its head-to-head competition with the ARL contrasts with the precarious condition of the USFL almost from its inception.

The merger agreement between the ARL and News and the current status of the NRL provide evidence that a media league may be an effective challenger to an established league. When traditional professional sports leagues in the same sport merge, the established league in the sport typically dominates the rival league and dictates the terms of the merger. The structure of the NRL shows, however, that in the ARL/Super League merger News is, at a minimum, an equal to the ARL.

A six-member Partnership Committee governs the NRL.<sup>946</sup> News and the ARL each appoint three members to the Partnership Committee.<sup>947</sup> The chairman of the Partnership Committee rotates each year between a News appointee and an ARL appointee.<sup>948</sup> News, arguably, has greater influence on

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943. MASTERS, *supra* note 848, at 29.

944. *Id.* at 42.

945. See *supra* notes 187-265 and accompanying text (discussing the creation of the NRL).

946. Masters Interview, *supra* note 47; Proposed Merger Agreement, *supra* note 189, at 11.

947. Proposed Merger Agreement, *supra* note 189, at 9.

948. Roy Masters, *Love Conquers All as Warring States Strike Deal*, SMH.COM.AU (discussing the aftermath of the litigation between the NSWRL and QRL over electing directors to the ARL), available at <http://www.smh.com.au/news/9903/13/sport/sport2.html> (last visited Mar. 13, 1999);

policy making in the NRL than the ARL does. Since its only constituency is its shareholders, News' appointments to the Partnership Board are concerned solely with operating the NRL for the greatest benefit to News. The ARL, on the other hand, represents the interests of a number of regional rugby league associations, which not uncommonly have divergent objectives and disagree with the ARL on issues. The ARL's selections to the NRL Partnership Board often represent an attempt to placate various constituents and include individuals who are not committed solely to furthering the ARL's agenda.<sup>949</sup> The NRL is heavily dependent financially on News since the ARL expended a large percentage of its monetary reserves fighting News in court and for players prior to the merger. News' control over the NRL's financial policy gives it substantial sway in deciding league matters.<sup>950</sup> News also obtains leverage from its 70% ownership of one NRL club, 50% ownership of two clubs, and 40% ownership of a fourth club.<sup>951</sup> The ARL does not own any NRL clubs.<sup>952</sup> News' ability to obtain the ARL's agreement to reduce the number of Sydney clubs in the NRL over the objections of influential ARL supporters further reflects the influence the mega-media company has on the partnership.<sup>953</sup>

The financial terms of the merger are also favorable to News. The ARL and News split equally the profits from the NRL.<sup>954</sup> The merger agreement gives News the free-to-air television and radio transmission rights to the NRL for twenty-five years.<sup>955</sup> News has sold the free-to-air television rights to PBL for fifteen years.<sup>956</sup> Currently, both Foxtel, a cable television venture owned

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New South Wales Rugby League Ltd. v. Australian Rugby League, [1999] N.S.W.C.A. 9 (New South Wales Ct. App. Feb. 23, 1999) (AustLII.edu.au, Austl. Case Law) (adjudicating dispute between New South Wales Rugby Football League Ltd. and Queensland Rugby Football League Ltd.).

949. Masters, *supra* note 948 (reporting on disagreement between New South Wales Rugby Football League Ltd. and Queensland Rugby Football League Ltd. over appointment of directors to the board of directors of the ARL), available at <http://www.smh.com.au/news/9903/13/sport/sport2.html>.

950. Roy Masters, *The Year of Living Dangerously*, SMH.COM.AU (noting that the NRL could not survive without the money the clubs receive from News), available at <http://www.smh.com.au/news/9903/01/sport/sport3.html> (last visited Mar. 1, 1999).

951. Masters, *supra* note 209 (describing News' ownership interests in NRL clubs).

952. *Id.*

953. See *supra* notes 187-277 and accompanying text (discussing the reduction of clubs in the NRL); Steve Mascord, *Court Win Renews Club Cuts Battle*, SMH.COM.AU (reporting on efforts of officials of the New South Wales Rugby Football League Ltd. to use their influence with the ARL to stop the NRL's rationalization plans), available at <http://www.smh.com.au/league/news/199903/01/league33.html> (last visited Mar. 5, 1999).

954. Proposed Merger Agreement, *supra* note 189, at 8.

955. *Id.* at 16.

956. Masters Interview, *supra* note 47.

50% by Telstra and 25% apiece by News and PBL, and Optus Vision, own pay television rights to the NRL.<sup>957</sup> The NRL's pay television rights contracts expire at the end of the 2000 season.<sup>958</sup>

An aspect of News' experience relevant to a mega-media company contemplating the creation of a rival league is the harmful effect of a bidding war for players. A bidding war not only dramatically increases the operating costs for a media league, but also generates negative publicity for the new venture. A mega-media company starting a rival media league in the future needs to guard against engaging in a bidding war with the established league in the sport. A bidding war can likely be avoided if a mega-media company focuses on developing its media league over the long-term and undertakes a financially astute player acquisition strategy.<sup>959</sup>

Though one professional sports league still dominates each sport in Australia and the United States, the Super League saga shows that a media league can be a significant challenger to an established league.

## CHAPTER FIVE

### HARBINGERS OF MEDIA LEAGUES

Many incidents in the United States and Australia foreshadow the creation of media leagues. Mega-media companies are becoming more involved in professional sports leagues in both countries. Many of the newest professional sports leagues in the United States have a single entity structure.<sup>960</sup> Of the various indicia, three harbingers are particularly relevant since they speak of the past, present and future of the media league concept.

#### I. PBL'S WORLD SERIES CRICKET IN AUSTRALIA

In the 1970s, PBL, owner of the most popular broadcast television

957. Proposed Merger Agreement, *supra* note 189, at 16 (delineating ownership of NRL's transmission rights); Finola Burke, *PBL Snags \$70m Fox Sports Option*, NEWS.COM.AU (reporting PBL's purchase of 25% of Foxtel from News), available at <http://finance.news.com.au/content.4350953.html> (last visited Oct. 7, 1999).

958. Masters Interview, *supra* note 47.

959. Bast, *supra* note 142, at 15 and accompanying text (citing economic studies for the proposition that long-term competition between rival leagues should lower, not raise, player salaries), available at <http://www.heartland.org/sprtsstad.htm>. But see Neale, *supra* note 8, at 10-11 (predicting that in a rival league situation competitive bidding for players will raise the costs of one league above its revenues leading to its demise).

960. COZZILLIO & LEVINSTEIN, *supra* note 7, at 20 (noting the recent popularity of the single entity structure for new professional sports leagues in the United States).



network in Australia, wanted to purchase the exclusive free-to-air television rights to Australian international Test cricket matches.<sup>961</sup> Despite receiving a much higher offer from PBL, the Australian Cricket Board (ACB) refused to sell exclusive transmission rights to the commercial broadcaster and instead sold the non-commercial free-to-air rights to the Australian Broadcasting Commission (ABC), a government-owned television network.<sup>962</sup> Stymied by its dealings with the ACB, PBL's alternative solution to acquire premium professional cricket programming was to produce its own professional cricket competition – World Series Cricket.<sup>963</sup>

World Series Cricket consisted of a series of matches primarily in Australia featuring many of the top cricket players in the world.<sup>964</sup> PBL's teams played for substantial prize money for the winner of the matches.<sup>965</sup> PBL's matches were played during the Australian summer in direct competition with the ACB's international Tests.<sup>966</sup> Many of the best cricket players in Australia and the world joined World Series Cricket, despite the threat of losing their places on their national teams if they contracted with PBL.<sup>967</sup> Since the wages for a professional cricketer were relatively low at that time, PBL had little difficulty finding players willing to play for World Series Cricket since it offered salaries up to five times greater than the amount the players had been earning from their respective national cricket boards.<sup>968</sup> PBL initially signed fifty-one players, enough to field four teams—two Australian teams, a West Indies team, and a "Rest of the World" team.<sup>969</sup> Though initially denied access by some cricket grounds aligned with the ACB, PBL eventually gained entry into playing facilities across Australia.<sup>970</sup>

World Series Cricket was not an immediate box office success. Attendance and television ratings for PBL's initial matches were low.<sup>971</sup> As its first season progressed, however, World Series Cricket gained public support. By introducing a number of innovations into cricket, many of which became staples of the game, PBL greatly increased its following. For

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961. HENRY BLOFELD, *THE PACKER AFFAIR* 15 (1978).

962. *Id.* at 15-16.

963. GIDEON HAIGH, *THE CRICKET WAR* 35 (1993).

964. BLOFELD, *supra* note 961, at 22.

965. *Id.* at 23.

966. *Id.*

967. PETER MCFARLINE, *A GAME DIVIDED* 95 (1977).

968. CHRISTOPHER FORSYTH, *THE GREAT CRICKET HIJACK* 27 (1978).

969. MCFARLINE, *supra* note 967, at 56, 90.

970. *Id.* at 56.

971. HAIGH, *supra* note 963, at 119-20.

example, World Series Cricket popularized one-day cricket matches and night cricket matches using a white cricket ball.<sup>972</sup> PBL revolutionized the televising of cricket with interesting camera angles and placement of microphones, which improved ratings for PBL's telecasts of World Series Cricket.<sup>973</sup> By the end of its first season, World Series Cricket was gaining momentum as a legitimate, alternative cricket competition to the ACB's international Test matches.<sup>974</sup> World Series Cricket continued to grow in stature during its second season with traditional cricket venues, such as the Sydney Cricket Ground, granting PBL access, attendance increasing at matches, and television ratings rising.<sup>975</sup> PBL even organized a series of matches in the West Indies in its second year.<sup>976</sup>

Though it originally decried PBL's competition as a "circus,"<sup>977</sup> by the end of World Series Cricket's second season, the ACB discovered that its control over cricket in Australia was slipping.<sup>978</sup> The ACB, faced with waning public interest and lower revenues, approached PBL about a peace accord. The ACB and PBL reached an agreement under which PBL received the right to purchase the exclusive free-to-air television rights to the ACB's international Test matches in exchange for discontinuing World Series Cricket.<sup>979</sup>

World Series Cricket had the trappings of a media league. PBL owned and controlled every aspect of World Series Cricket. The impetus for starting World Series Cricket was PBL's desire to obtain premium sports programming. Players were signed and allocated to a particular team. PBL used its political ties and financial strength to negotiate access to playing facilities. Though ultimately World Series Cricket was discontinued and the ACB regained dominance in the sport, PBL showed its ability to produce a successful rival competition.<sup>980</sup>

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972. *Id.* at 127-28.

973. *Id.* at 104, 172-73.

974. *Id.* at 174-75.

975. *Id.* at 224-29.

976. *Id.* at 265.

977. *Id.* at 317.

978. *Id.* at 279.

979. *Id.* at 289-90.

980. Philip Cornwall, *From Gazza to Dazza*, in *NOTHING SACRED: THE NEW CRICKET CULTURE* 55, 60 (Alastair McLellan ed., 1996) (noting that News Corporation's successful forays into professional sports traces back to PBL's success with World Series Cricket).

## II. TURNER SPORTS' GOODWILL GAMES

Founded in 1985, with the inaugural games held in 1986, the Goodwill Games is a creation of Turner Sports, now a Time Warner company.<sup>981</sup> Though not a media league, the Goodwill Games is a "media Olympics," with a competition format analogous to that of the Olympic Games.<sup>982</sup> The Goodwill Games is a multi-day competition involving international athletes competing in sports contested at the Olympics. The athletes compete for "substantial" prize money based on performance.<sup>983</sup> Turner Sports stages the Goodwill Games every two years with alternating summer and winter versions.<sup>984</sup>

Turner Sports' ownership of the Goodwill Games provides the mega-media company with the transmission rights as well as other products of a premium sporting event involving many of the world's best athletes. Turner Sports receives a substantial amount of sports programming for its cable channels from producing the Goodwill Games. For example, in 1986, Turner Sports aired 129 hours of television coverage of the Goodwill Games on its cable channels in the United States and made available almost 200 hours of sports programming to television broadcasters in 66 countries.<sup>985</sup> Approximately 482 million television households watched the 1990 Goodwill Games.<sup>986</sup> According to Turner Sports, the 2000 Winter Goodwill Games "averaged a 1.1 rating in prime time, about the same as ESPN's college basketball."<sup>987</sup> The Goodwill Games also enables Turner Sports to fulfill humanitarian objectives by promoting world peace and giving athletes an alternative competition to the Olympics.<sup>988</sup> Turner Sports' continuation and expansion of the Goodwill Games indicates that the mega-media company

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981. *Goodwill Games Organization*, GOODWILLGAMES.COM, available at [http://goodwillgames.com/html/hm\\_orgCompany.html](http://goodwillgames.com/html/hm_orgCompany.html) (last visited Mar. 11, 2000).

982. *The Goodwill Games: Past, Present and Future*, GOODWILLGAMES.COM, available at [http://goodwillgames.com/html/hm\\_history.html](http://goodwillgames.com/html/hm_history.html) (last visited Mar. 11, 2000) (describing the Goodwill Games as an "international, multi-sport invitational event").

983. *Goodwill Games Quick Facts*, GOODWILLGAMES.COM, available at [http://goodwillgames.com/html/hm\\_quickFacts.html](http://goodwillgames.com/html/hm_quickFacts.html) (last visited Mar. 11, 2000).

984. *Goodwill Games Mission Statement*, GOODWILLGAMES.COM, available at [http://goodwillgames.com/html/hm\\_mission.html](http://goodwillgames.com/html/hm_mission.html) (last visited Mar. 11, 2000).

985. *The Goodwill Games: 1986, The Inaugural Games*, GOODWILLGAMES.COM, available at [http://goodwillgames.com/html/hm\\_history5.html](http://goodwillgames.com/html/hm_history5.html) (last visited Mar. 11, 2000).

986. *The Goodwill Games: 1990 and Seattle*, GOODWILLGAMES.COM, available at [http://goodwillgames.com/html/hm\\_history4.html](http://goodwillgames.com/html/hm_history4.html) (last visited Mar. 11, 2000).

987. Rudy Martzke, *CBS Studio Team Calls on Ditka to Join Huddle*, USA TODAY, Feb. 25, 2000, at 2C (citing a Turner Sports executive).

988. *Goodwill Games Mission Statement*, *supra* note 984, available at [http://goodwillgames.com/html/hm\\_mission.html](http://goodwillgames.com/html/hm_mission.html).

derives not insignificant benefits from owning this sporting event.

### III. NBC'S AND TIME WARNER'S PROPOSED PROFESSIONAL FOOTBALL LEAGUE IN THE UNITED STATES AND NBC'S EQUITY INVESTMENT IN THE XFL

In 1998, NBC and Turner Sports announced plans to create and jointly operate a new professional football league in the United States to start play in 2000.<sup>989</sup> NBC and Turner Sports made their decision in response to their unsuccessful attempts to acquire television rights to NFL games following the 1998 NFL season.<sup>990</sup> NBC and Turner Sports had televised NFL games for thirty-three and eight years, respectively, prior to 1998.<sup>991</sup> If created, NBC's and Turner Sports' professional football league would have been the first media league in the United States.

The working name of the proposed media league was the "Fans Football League."<sup>992</sup> NBC and Turner Sports were to own the league, which would have had between ten and twelve teams in major American cities.<sup>993</sup> The league was supposed to play its games during the summer months, just prior to the start of the traditional football season in the United States.<sup>994</sup> Initially, the league was to start playing in summer 2000,<sup>995</sup> but its launch was later delayed until at least summer 2001.<sup>996</sup>

NBC and Turner Sports cancelled their plans to create the Fans Football League in December 1999.<sup>997</sup> In late 1999, NBC and Turner Sports purchased the transmission rights to NASCAR, an automobile racing series in the United States, for a combined \$1.2 billion (U.S.) over six years in order to increase

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989. *NBC, Turner Go For New Football League*, ESPN SPORTS ZONE, available at <http://www.espnsportszone.com> (last visited May 29, 1998).

990. *Id.*

991. *Id.*

992. Rudy Martzke, *Sweeps Give NBC Combo Long Break*, USATODAY.COM, available at <http://www.usatoday.com/sports/comment/colmart.htm> (last visited June 14, 1999).

993. *NBC and Turner Sports Plan Pro Football League of Their Own*, NANDO.NET, available at <http://www.nando.net> (last visited May 27, 1998).

994. Martzke, *supra* note 992, available at <http://www.usatoday.com/sports/comment/colmart.htm>.

995. Rudy Martzke, *No Sour Grapes for Costas*, USATODAY.COM (reporting that NBC and Turner were to announce in April 1999 whether their league was going to start in 2000), available at <http://www.usatoday.com/sports/comment/colmart.htm> (last visited Feb. 18, 1999).

996. Rudy Martzke, *Staying Alive: Dierdorf Returns to CBS*, USATODAY.COM (noting that 2001 is the earliest possible launch of NBC's and Turner Sports' football league), available at <http://www.usatoday.com/sports/comment/colmart.htm> (last visited Apr. 14, 1999).

997. Rudy Martzke, *NBC-Turner Race Deal Boots Football League*, USA TODAY, Dec. 1, 1999, at 2C.

their sports programming in the spring and summer.<sup>998</sup> The NASCAR events, scheduled for Sunday afternoons in the summer, conflicted with the proposed times for the Fan Football League games.<sup>999</sup> Despite finding interest in their proposed league throughout the United States, NBC and Turner Sports decided that due to their NASCAR commitments they no longer had the resources to create a professional football league.<sup>1000</sup>

NBC's and Turner's decision not to start a media football league does not foreclose the possibility of media league creation in the United States. In fact, NBC has announced that it has purchased 50% of the proposed XFL, a new single entity professional football league created by the World Wrestling Federation.<sup>1001</sup> The XFL is to commence play in February 2001 immediately after the conclusion of the NFL season.<sup>1002</sup> NBC plans to air games on Saturday nights in prime time; UPN, a fledgling commercial broadcaster is slated to show games on Sunday nights; and the XFL is in negotiations for the sale of its pay television rights.<sup>1003</sup> NBC's equity investment in the XFL illustrates the implementation of the media league concept in the United States.

### CONCLUSION

Technological innovations are greatly affecting American and Australian societies. Television and professional sports, two pillars of American and Australian life, are changing as a result of this latest technological revolution.

Mega-media companies are inventing services and products that are redefining consumers' experiences with electronic media. A key ingredient in building consumer acceptance of these new offerings is attractive entertainment content. Since professional sports are highly popular in the United States and Australia, mega-media companies covet professional sports programming. The transmission rights to traditional American and Australian professional sports leagues, however, are scarce. In addition, traditional professional sports leagues in both countries suffer from collective action problems that reduce the quality of their products. These two factors often prevent a mega-media company from securing an optimal supply of

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998. *Id.*

999. *Id.*

1000. *Id.*

1001. NBC Becomes Partner in XFL, at <http://www.espn.go.com/moresports/news/2000/0329/452547.html> (last visited Mar. 29, 2000).

1002. *Id.*

1003. Rudy Martzke, *NBA Playoff Schedule Finally Could Do Some Favors for NBC*, USA TODAY, May 19, 2000, at 2C.

professional sports content. In both the United States and Australia, mega-media companies are undertaking measures, such as purchasing individual clubs and investing in playing facilities, to improve their prospects of obtaining the transmission rights of traditional leagues. These actions, while beneficial, are not eliminating the risks associated with contracting with a traditional league.

A mega-media company's in-house production of a professional sports league is an alternative means of acquiring professional sports programming. A media league differs from traditional American and Australian professional sports leagues. A media league's vertical structure contrasts with the horizontal arrangements between individual clubs in the major American and Australian traditional leagues. The benefits from organizing a professional sports league as a single economic entity explain the use of the limited liability company model for new professional sports leagues in the United States. A media league, consisting of wholly owned club subsidiaries of a parent mega-media company, represents a sharper break with the horizontal structure of a traditional league and gives the league organizer greater protection from legal challenge than does the limited liability company organizational structure.

Media league creation, however, is not problem-free. A number of interesting issues involving aspects of media, constitutional, labor, and antitrust law arise from a mega-media company's formation of a professional sports league in either the United States or Australia. Though not void of complexity, these issues are not serious impediments to media league creation.

The prospects of media league creation cast doubt on the continuing validity of the widely accepted principle that no more than one major professional sports league can flourish in a sport. Experiences in Australia show that mega-media companies have the resources to launch professional sports competitions, often in the face of strong opposition. As distinguished from the typical dismal fate of American rival leagues, the sporting ventures created by Australian mega-media companies have an impressive record of achieving equal stature with their established counterparts. Though a media league has not yet been formed in the United States, at least one American mega-media company is actively pursuing the concept at the present time.

Though the ultimate success of media leagues cannot be guaranteed, they deserve consideration because of the role of sport and the media in the United States and Australia. Americans and Australians are not soon to lose their love for professional sports. Though the most popular sports of today may not be the ones of choice tomorrow, the pursuit of athletic excellence is likely to always occupy a significant societal position in the United States and Australia. Americans and Australians are also certain to continue their infatuation with electronic media as a source of entertainment and an outlet to

spend leisure time and dollars. Whether in the form of radio, television, Internet, or next-generation technology, multi-media devices and services are mainstays for the attention and income of consumers in both countries. Since content is an indispensable element of the entertainment mix,<sup>1004</sup> mega-media companies are not expected to lose their insatiable desire for access to and control of professional sports. Until these market conditions change dramatically, a media league shall remain an important and timely item of discussion in the United States and Australia.

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1004. WOLF, *supra* note 3, at 54 (noting the importance of content in the burgeoning entertainment economy).